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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-751

J. M. YOUNG,
Petitioner,

vs.

ETHYL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

The Petitioner, J. M. Young, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 8, 1978. in Appeal Numbers 77-1807 and 77-1829 of that Court.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals (unreported), rendered August 8, 1978, printed in (App. A. p. A-1). The judgments of Eighth Circuit in 77-1807, rendered August

8, 1978 (App. B, p. A-10) and in 77-1829 entered August 8, 1978 (App. C, p. A-11). Orders denying Petition for Rehearing and En Banc Hearing dated September 8, 1978 (App. E and F, pp. A-28 and A-42). Order denying Motion to Recall Mandate, dated October 11, 1978 (App. G, p. A-43).

The opinion of the United States District Court for the Western District of Arkansas rendered February 24, 1977, reported as *Young v. Ethyl Corp., et al., 444 F.Supp. 207* as printed herein in (App. T, p. A-87). The opinions rendered by the United States District Court for the Western District of Arkansas filed September 13, 1977, denying respondents motion under Rule 59 and for New Trial printed in (App. U and V, pp. A-123 and A-135).

The opinion of the Eighth Circuit entered July 25, 1975, and reported in *Young v. Ethyl Corp., 521 F. 2d 771 (8th Cir. 1975)* (App. S, p. A-78).

The opinion of the United States District Court reported as *Young v. Ethyl Corp., et al., 328 F. Supp. 769 (Western District of Arkansas, 328 F. Supp. 769 (W. D. Ark. 1974)* (App. R, p. A-68).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on August 8, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under U. S. C. No. 1254 (I).

QUESTIONS PRESENTED

1. Whether this court can correct the gross errors of facts as reflected by the opinion of the Eighth Circuit Court.
2. Whether the lower Court's decision created (or intended to create) economic slavery.

3. Whether the opinion of the lower Court discriminated against the poor and aged in favor of the rich and powerful.
4. Whether the lower Court can grant the right of eminent domain to a private corporation, or to the wealthy.
5. Whether the lower Court can license the rich and powerful to take valuable property from the poor without just compensation.
6. Whether the opinion and rulings of the Eighth Circuit can conflict with its own decision and that of other Circuit Courts and destroy rights recognized under them.
7. Whether the decision of the lower Court conflicts with rules of property laid down by the Supreme Court of Arkansas on Arkansas law.
8. Whether the decision of the lower Court can establish unequal economical standards as between rich and poor.
9. Whether the opinion of the lower Court can give an ex post facto effect to a state Statute.
10. Whether this court can exercise the equitable powers granted to it by Article 3, Section 2 of the United States Constitution in order to correct the gross injustices imposed by the decision of its lower Court.

STATEMENT OF CASE

This case is an action under diversity of citizenship (28 U. S. C. No. 1332) in trespass and conversion brought by J. M. Young, a farmer, who is now 88 years of age. It was brought against Ethyl Corporation, and Great Lakes Chemical Company, Calvert Exploration Corporation, and Bromet Company. Ethyl Corpora-

tion assumed all liability and asked that the action be dismissed as against Bromet Company, Great Lakes Chemical Company and Calvert Exploration Corporation and same was done and they are not necessary parties to this appeal. The action was brought on February 17, 1972 in the United States District Court for the Western District of Arkansas, El Dorado Division, seeking recovery of valuable bromines and other finished products forcefully removed from the Petitioner's 169 acres of land.

Ethyl purchased leases on approximately 90 per cent of a 15,040 acre block. Before any of this block was leased the Petitioner refused to execute a lease proffered to him because of the onerous terms of the lease.

After the Petitioner refused to execute the lease Ethyl drilled three production wells north, northeast and northwest of Petitioner's land from which it pumped saltwater containing large quantities of elemental bromine contained in the brine from the Smackover Limestone Formation at approximately 8,200-8,600 feet below the surface. Simultaneously, it drilled an injection well immediately south of Petitioner's land. By means of powerful submersible pumps the fluids were removed from the formation and by direct pipeline carried same into Ethyl's plant located approximately 200 yards south of Petitioner's land. There the valuable minerals are (and were) removed from the brine and the demineralized brine reinjected in the same formation by means of a powerful pump. By this method the bromines were swept from underneath the Petitioner's land. By this hydraulic system pressure was exerted throughout the Smackover Limestone Formation which ultimately removed the bromine from Petitioner's land and left the waste brine in the formation underlying the entire 169 acres.

The bromine and other minerals removed from the brine were marketed. With all expenses of inside and outside the unit (including legal fees of this suit) deducted from its initial operations up to July 1, 1976, Ethyl had netted $100,000,000.00 from its plant sales.

The ethylene dibromide made at the plant is shipped to Ethyl's plant in Louisiana where it is made into tetraethyl lead (a gasoline additive). Sulphur is also recovered. The gas produced along with the operations is used to help operate the plant.

The bromine mining operations were begun in 1969. This suit was filed February 17, 1972. Ethyl claimed it had the right to take Mr. Young's bromines under the law of capture. In the original trial the Honorable Oren Harris sustained Ethyl's contentions. On appeal the Eighth Circuit sustained the finding of facts by Judge Harris, but reversed his ruling of law, and held that Ethyl's operation constituted "actionable trespass" and remanded the case for the purpose of providing the proper relief. After a motion to recuse Judge Harris was sustained, the case was assigned to Honorable Paul X. Williams, Chief Judge for the Western District of Arkansas.

Judge Williams ruled throughout the trial that Petitioner Young (plaintiff below) had the burden to prove "bad faith" trespass on the part of Ethyl and had the burden to prove his damages. Judge Williams found Ethyl to be in good faith, yet found its acts of trespass to be "deliberate and intentional." He entered a judgment in favor of Petitioner for $1,119,922.24 for his part of the net profits for the initial operational unit, and ordered an annual accounting thereafter. A rehearing was denied and Ethyl appealed and Petitioner cross-appealed.

On the appeals, the panel of the Eighth Circuit Court reversed the trial court on damages and held that brine was the initial commercial product and not bromine and other plant products. It sustained the trial court as to its finding of good faith.

The decision of the Eighth Circuit held that the Petitioner had no technical training in digging deep wells for brine or

building highly technical plants for converting brine into sophisticated chemical products. That he was not financially able to participate in the cost of digging the wells. That due to his limitations he was limited to recovering from either a ⅛ royalty on brine, or the net of the brine which was the waste from the operations. The Court also held saltwater to be a mineral under Act 126, Section 1, Page 94 of 1975 of Arkansas General Assembly (Ark. Statute Anno. No. 52-201 as amended in 1975).

The decision of the lower Court held that the trial court created a unit and that this it could not do. It also erroneously stated that most of Ethyl's leases provided a ⅛ royalty on brine at the "wellhead".

The wells surrounding Mr. Young's property produced 76,-133,807 pounds of bromine valued at $18,447,221.00, plus sulphur at a value of $147,820.00, making a total of $18,595,-141.00. This was commingled with that from the rest of the field unit.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it violated the Petitioner's rights to own, possess, and protect his property under U. S. Constitution Amendment 5, and Arkansas Constitution Article 2 § 8. Both are similar and have had similar interpretations.

Full compensation under the Constitution also applies to unlawful taking of property by individuals. *(Tidewater Oil Co. v. Jackson, 320 F.2d 157 (10th Cir. 1963).*

Arkansas Constitution Article 2 § 22 says:

> "The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use without just compensation therefore."

The compensation must be the best and highest use it can be put. *(Young v. Gordon, 275 SW 890, 169 Ark 299 Ark. 1925)*

This rule was sustained and broadened in the Arkansas Supreme Court case of *Burford v. Upton, 338 SW2d 929,232 Ark 456 (1960)* It added that the "best use value" would be what the best private use of property could be put.

"Just compensation" was held by Arkansas Supreme Court in *Martin ex parte Vol. 13, Ark. 198, 58 Am. Dec. 321 (1853)* to be the only way to "protect the weak from the strong and the minority from the majority." Otherwise it would be "an empty sound of justice."

The Arkansas Law on the conversion of property by good faith trespassers was set out in 1951; and was set out so clearly that no case has been to the Arkansas Supreme Court since on

that subject. *(Burbridge v. Bradley Lumber Co., 239 SW2d 285, 218 Ark 897, 1951).*

Its rules chiefly were:

1. No profit can be made by taking another's property.
2. A person has a right to keep his property, even if no value.
3. He is entitled to protection of the law.
4. It would be gross injustice to force him to sell.
5. To have him accept the value at time and place of taking would place a premium for the wrongdoer to practice heedlessness and blunders, and use false evidence to make an intentional trespass appear to be an innocent mistake.

The lower Court relied on the case of *National Lead Co. v. Magnet Cove Barium Corporation, 231 F. Supp. 208 (W.D. Ark. 1964).* It was not an Arkansas Supreme Court case and had no effect under *Erie (36 C.J.S. No. 175, p. 412).* The National Lead case was not in point. It was a case of an innocent and inadvertent mistake. The case at bar was willful and intentional.

Dicta is not a ruling under Erie *(Burden v. New York 107 F. 2d 705).*

Again, the opinion of the lower Court omitted two of the three elements set out by *National Lead Co. (supra)* and *Ward v. Spadra Coal Co., 272 S.W. 353 (Ark. 1925).*

Most all cases, including these above two, held that either of the following three elements demand the value of the finished product, without deductions for expenses:

1. "Bath faith", or
2. "Intentional", or
3. "Willful".

It was admitted by Ethyl that it intentionally and deliberately took Mr. Young's bromide. Judge Williams so found (App. T, p. A-95):

> "The trespass was an act done deliberately by very smart and able operators who intended to and skillfully did exactly what they deliberately planned to do, which was to remove brine, bromine and other valuable minerals from the Smackover Formation under the lands belonging to J. M. Young."

The lower Court erred in its interpretation of the *National Lead Co. case (supra).* This subject case is not one of innocent mistake, whereas National Lead was. This is a suit by the owner of the fee title. The National Lead case was a controversy between two lessees who had only the right to remove. Neither owned the land.

The decision of Judge Williams should take precedent over the National Lead case because Judge Williams had facts and circumstances before him and a complete review of Arkansas decisions. He found the facts and decided on equitable principles and the Arkansas rule—"No profit to a wrongdoer."

The opinion of the lower Court was based on material errors of facts as follows:

1. The lower Court found that most of the leases of Ethyl provided for a royalty of ⅛ of the value of brine at the "wellhead." This is an absolute error. "Wellhead" is not in any lease Ethyl used. (App. W, pp. A-136-145)

The plant and field superintendents testified Ethyl's leases were all alike and provided $10.00 per acre per year "in lieu of royalty" for saltwater (App. O, pp. A-57-58).

2. The lower Court found that Ethyl had legal advice it could operate as it did under the law of capture. (App. A, p. A-4).

Ethyl received an opinion from Baker & Botts, Attorneys, advising it that it should drill on but one lease tract in order to be protected under the law of capture (App. Q, p. A-66). Ethyl violated this advice and surrounded Mr. Young's land with one injection well and three production wells, all being operated by use of powerful pumps under an effective hydraulic system.

3. The lower Court found that Mr. Young was a limited farmer, more than 84 years of age and had no training in digging deep wells for brine nor in building a highly technical plant for converting brine and sophisticated chemical products (App. A, pp. A-4-5). The opinion said Mr. Young never participated in the costs of the plant and should not receive anything from plant products. Several millions in sale prices of his bromines were used by Ethyl. The errors in this finding are:

(i) Ethyl refused to let anyone participate. (App. N, pp. A-54-56)

Mr. Paul Jameson offered to participate in the "whole kit and kaboodle" and was refused. Why should Plaintiff Young be penalized for not doing something he would have been denied the privilege. It would be like holding a man down and saying he is too lazy to get up.

(ii) The lower Court found that Mr. Young was not trained in "converting brine into sophisticated products." The error here is that the brine was not converted into anything. It was returned to the formation after the plant separated bromine from the brine (App. A, pp. A-4, A-5).

(iii) The panel found that Mr. Young, or any other lessee, could not have profitably operated for brine. (App. A, p. A-5).

The error of this is that under its unit operation no one but Ethyl could have operated any part of the unit.

The lower Court also erred in finding that brine was the product Ethyl mined.

This error of fact was disputed by Ethyl's own witnesses.

Mr. Beeson, on direct examinations, explained the closed-circuit operations and the commingling as one operations (App. J. pp. A-47-49). Mr. Beeson also said:

> "This has to be viewed as a closed-circuit operation. There is involved, fundamentally, in the operation producing wells, collecting lines to move the brine into a plant where the bromine is extracted, and then the brine is reinjected. It's obviously different from the oil and gas industry or the oil industry where oil is produced to the surface and has a market at that point. *Without the plant there wasn't a market.*"[1] (App. K, p. A-50)

Ethyl's able trial lawyer then got Mr. Beeson to say that without the field there was no plant and "without a plant, the brine field is useless. These two go hand in hand and are inseparable." (App. K, p. A-50)

Mr. Madden, on leading questions by Ethyl's lawyers, said there was no market for brine, even with bromines in it. He said it had "no market in the usual commercial sense." Still speaking of brine Ethyl's attorney asked Ethyl's witness on direct examination:

> "Q. "So, then, the only market that it would have had was the finished product that you finished at your plant after you got through manufacturing?"
>
> A. "That is right."

---

[1] Italics ours.

Q. "Then you manufacture it into a product, don't you?"

A. "Right."

Q. "And up until then it had no market value whatsoever, did it?"

A. "No, you can't—it's pretty hard to sell saltwater." (App. L, p. A-51)

In the face of all of the off-setting evidence, mostly being Ethyl's own clear and concise evidence, the panel still found contrary to all proof. These things were pointed out in Petitioner's brief. At the oral argument, the panel admitted a failure, up to that point, to read Petitioner's brief and the testimony. With all humility, we say respectfully that from the findings as set out by the panel, neither the brief of Petitioner nor the transcript of the evidence, has been reflected in conclusions of facts as set out by the panel. We say this in order that this Court may take note and prevent a gross injustice being done to this Petitioner and others in a like situation of facts.

The Panel said brine was the marketable product. Ethyl's own witnesses, questioned by its own lawyer, said "brine was not a product, had no market, was returned to the formation, and that the plant products constituted its first market." Mr. Beeson said "their operations were not like oil that had a market when it reached the surface." (App. K, p. A-50) Yet, the panel found opposite from Ethyl's expert witnesses.

The Panel Erred in Conflicting With Decisions of Other Circuit Courts on the Same Facts and Questions.

The case of *Dow Chemical Corp. v. Commissioner of Revenue, 51 Tax Ct. 669 (1969), 433 F. 2d 283 (6th Cir. 1970),* is identical to the case at bar. The brine was pumped from an underground formation to a plant where bromine was extracted

and the brine was returned. Dow sought to use the value of bromine as a depletion allowance. Internal Revenue Commission claimed brine was the product. Dow denied that contention. The Tax Court and Sixth Circuit Court held that Dow was "a miner of bromine and not of brine." This gave tax benefits of millions to Dow, Ethyl and others.

Now Ethyl makes the opposite claim in order to defeat a valid claim.

The Court below also conflicted with the 10th Circuit on the unit operation but made a royalty contract, which the 10th Circuit refused to do in *Pan American Corp. v. Candelaria, 403 F. 2d 351 (10th Cir. 1969).*

Arkansas holds that a contract cannot be created, except on all terms agreed upon by the parties, *Hanna v. Johnson, 344 S.W. 2d 846 (Ark. 1961).*

The royalty contract by the lower court is substantially more punitive than the one Mr. Young rejected.

It also conflicted with the 10th Circuit in *Tidewater Oil Co. v. Jackson (supra)* as to compensation.

The decision of the Eighth Circuit in 1975 (App. S, p. A-78) said one cannot "plunder" under disguise. The decision of August 8, 1978, grants the license to plunder.

It also conflicts with the holding of law in the cases of *Robert v. Williams, 15 Ark. 43 (1854); Burbridge v. Bradley Lumber Co. (supra); Young v. Gordon, 275 S.W. 890, 169 Ark. 299 (1925);* and *Buford v. Upton, 338 S.W.2d 929 (1960)* as to full compensation.

The opinion of the lower Court brings to this Court one of the most serious problems this Court has ever faced. It presents to this Court the opportunity and duty to protect constitutional rights affecting the ownership of property. The lower Court

held that a poor and aged person cannot reap any benefits out of his property confiscated by a powerful and knowledgeable group.

This is saying that if he owns land with huge rocks containing gold and he has not the know-how and machines to tear the rocks into gravel and then smelter out the gold, he will have to helplessly stand by while someone with the know-how and machinery crushes his rocks, melts out the gold and forces him to accept the wasted crushed rock or a ⅛ royalty of the crushed rock. That is squarely what is presented to this court.

The panel never mentioned the constitutional rights the Petitioner argued for in his brief.

The opinion permits a powerful person or corporation, to take a poor and aged Arkansas farmer's property and allow the trespasser to use false evidence to pretend good faith. This is in direct conflict with the law providing protection of property and property rights.

Property rights are protected under Amendment 5 of the United States Constitution and Art. 2, Secs. 8 and 22 of the Arkansas Constitution.

Sec. 22 of Art. 2 of Arkansas Constitution says:

> "The right of property is before and higher than any constitution sanction."

Full compensation is the best and highest use to which the property can be put. *Young v. Gordon (supra); Buford v. Upton (supra); Tidewater Oil Co. v. Jackson (supra).*

Full compensation is the only way to protect the "weak against the strong and the minority against the majority." It is the only way to prevent schemes to take another's property. *(Martin ex parte, Vol. 13, Ark. 198, 58 Am. Dec. 321 (Ark. 1853).*

Little Rock & F. S. R. Co. v. Green, 96 S.W. 129, 77 Ark. 387 (1906) and *Burbridge v. Bradley Lumber Co. (supra).*

The Decision of the Lower Court Creates Economic Slavery

To force its results on the Petitioner and others in his position will allow a powerful corporation to take the only piece of property a person owns and make millions out of it and pay the owner nothing unless he signs an onerous lease. It leaves the implication it can be done even if no lease is offered.

This decision squarely forces humiliating indignities and economic slavery upon poor people. After others have seen what expense and trouble caused Mr. Young, now 88 years of age, they will hesitate to defend their rights. All would rather yield to coercion than go broke and starve trying to protect the only piece of property they were ever able to buy.

The ruling of the lower court is in violation of United States Constitution Amendment 13, Sec. 1 and Arkansas Constitution Art. 2, Sec. 27, which both say that neither slavery nor "involuntary servitude shall exist." These two provisions are similar and bear identical interpretations. Webster says servitude is a "state of slavish dependence."

Anytime a large and ruthless corporation, or a rich person can take a poor person's property and still make a lucrative profit the landowner is his victim.

86 Corpus Juris Secundum at page 809, notes 52-54, answers this exact problem:

> "In modern law it is recognized that fear of property loss or economic loss, or loss of other substantial rights or privileges, is as effective means of compelling a person to act against his will as fear of bodily harm. The fact that a choice is made between comparative evils does not exclude duress."

The comparative evils are these:

1. The landowner can sign the operator's lease proffered, or
2. Suffer the confiscation of his property without just compensation.

The Opinion of the Lower Court Denied Equality Before the Law

Amendment 14, Sec. 1 of the United States Constitution, and Art. 2, Sec. 3 of the Arkansas Constitution provides for equality of all persons. The decision of the lower court creates peons out of the poor and unlearned.

The implication of favoring the rich over the poor does not have to be presumed in the opinion of the lower Court. It clearly expresses such distinction (App. A, pp. A-4, A-5).

The Decision of the Lower Court Gave Retroactive Effect to an Arkansas Statute

The statute was enacted in the 1975 Arkansas General Assembly (Act 126, p. 94 of 1975 General Assembly, which is Ark. St. Anno. No. 52-201 as Amended 1975).

The act intended to place saltwater with bromines in solution under a mineral interpretation. The act said that its classification had been uncertain. The opinion of the lower court applied it to the 1964-1975 operations of the plant (App. A, pp. A-5, A-6).

This was a violation of United States Constitution Art. 1, Sec. 10, sub-sec. (1) and Arkansas Constitution Art. 2, Sec. 17 which forbid a state to pass ex post facto laws. If a state is prohibited from passing such laws can a court give a state statute a retroactive effect?

PETITIONER WAS DENIED HIS "DAY IN COURT"

The opinion of the lower court and the trial court denied the Petitioner his "day in Court". The Arkansas Constitution says every person is entitled to a certain remedy for all injustices or wrongs to person or property and have it freely, completely and without denial. *Ark. Constitution, Art. 2, § 13.*

The trial court forced the Petitioner to try the case under the burden of proof as to bad faith of the trespasser and also as to amount of damages from the commingled bromines. This ruling was announced in (App. I, pp. A-45, A-46) to this petition. The ruling of proof being on Ethyl was not announced until two weeks after the trial ended.

This is the same as forcing a person charged with a crime to go through a trial with the burden to prove his innocence, and then after he is convicted and executed, the court announce that the state had the burden to prove him guilty and had met that burden.

The trial court found the lowest figures offered on bromines and other plant products as reflected by App. U, pp. A-105-107; but on page A-130 of App. U, the trial court reflects that strong evidence showed $6,584,134.00 of bromine and sulphur had been removed from Plaintiff Young's land. The Court on same page 52, found that the off-set wells surrounding Plaintiff Young's land produced $18,595,141.00 amount of bromine and sulphur.

Since the other figures were in dispute the courts should have held the commingled figures of $18,595,141.00 for the recovery figure *(C.J.S. 15A, pp. 549-554, §§ 4-7).*

The law does not limit recovery from a trespasser to the first commercial product; the recovery is extended to whatever

brings money to the trespasser. See *89 Corpus Juris Secundum, Page 678, Notes 65, 68.*

The presumptions were held in favor of the wrongdoers; they should have been held *against* the wrongdoer. This is Arkansas law and universal law!

The inequities created by the opinion of the lower Court can and should be corrected by this court, especially under powers granted it through equitable powers vested in this Court by Article 3, Sec. 2 of the Constitution of the United States.

CONCLUSIONS

A petition for a writ of certiorari should be granted in order to prevent the illegal exercise of eminent domain by large corporations in taking valuable property from poor individuals. It should be granted to prevent the establishment of economic slavery. It should be granted in order to restore uniformity of laws for all Circuit Courts of Appeal. It should be granted in order to allow an individual to own and protect his property. It should be granted to protect equal rights and opportunities of all people. It should be granted to prevent wrongdoers from making lucrative profits from theft. It should be granted to protect the equities of small ownerships of property and to prevent plundering of small landowners by large corporate interests. It should be granted to protect the dignity of man and to prevent indignities and coercion and helplessness being heaped upon poor people.

Respectfully submitted,

/s/ (By) MELVIN T. CHAMBERS
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APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

Nos. 77-1807 and 77-1829

J. M. Young,
Plaintiff-Appellee,
Cross Appellant

v.

Ethyl Corporation,
Defendant-Appellant,
Cross Appellee.

Appeal from the United States District Court for the Western District of Arkansas.

Submitted: May 16, 1978

Filed: August 8, 1978

Before VAN OOSTERHOUT, Senior Circuit Judge, LAY, Circuit Judge, and VAN PELT, Senior District Judge.*

VAN OOSTERHOUT, Senior Circuit Judge.

The primary issue presented by Ethyl Corporation's timely appeal is whether under the facts of this case the trial court applied a proper measure of damages. Plaintiff Young brought this action in federal court in 1972. He alleged Ethyl Corpora-

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* The Honorable Robert Van Pelt, Senior United States District Judge for the District of Nebraska, sitting by designation.

tion (Ethyl)[1] as a result of their brine recovery operation in the Kerlin Field in Arkansas committed an actionable trespass by taking brine from 6,000 feet below the surface of his land. Jurisdiction is based on diversity of citizenship.

The issue of liability was tried before Judge Harris who entered a final judgment dismissing the complaint for reasons stated in his memorandum opinion reported at 382 F.Supp. 769 (W.D. Ark. 1974). Judge Harris's determination was based on the view that the Arkansas law of capture applied and that under Arkansas law of capture Ethyl Corporation had a right to the brine underneath plaintiff's land and that plaintiff had failed to prove defendant had infringed upon any protected rights. Upon Young's appeal this court reversed the judgment of dismissal for reasons stated in *Young v. Ethyl Corporation*, 521 F.2d 771 (8th Cir. 1975). The case was remanded for a determination of damages. We are bound by such decision on the liability issue. Ethyl does not deny it is liable for damages. It does insist vigorously that the appropriate Arkansas measure of damages was not applied. The issue of damages was tried before Judge Williams without a jury. The transcript consists of 2358 pages. Also numerous exhibits were introduced.

Judge Williams in an opinion dated February 23, 1977, not reported, awarded Young $1,119,922.24 with interest from date of judgment at the rate of 6% per annum, and requires defendant to pay 169.1/15,040ths of the profits subsequent to July 1, 1976, as long as the Kerlin Field operation is continued. On September 13, 1977, the court denied defendant's Rule 59 motion and motion for a new trial. The defendant has appealed from the February 23, 1977, judgment and from the September 13, 1977, denial of his motion for a new trial and amendment of judgment.

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[1] Great Lakes Chemical Corporation, Calvert Exploration Company and Bromet Company were also named defendants. The action against such defendants was dismissed and no appeal from such dismissal is before us.

As grounds for reversal Ethyl urges: (1) error in refusing to follow applicable Arkansas law in awarding damages: (2) the unitization of Kerlin Brine Field as contrary to facts and law; (3) even if the trial court was correct in its theory of damages, material errors were committed in the application thereof; (4) the trial court abused its discretion in refusing to amend its judgment to correct obvious mathematical errors.

By timely cross appeal Young urges: (1) the court erred in determining that the defendant's acts of trespass were unintentional and in good faith; (2) plaintiff is entitled to the value of commingled assets; (3) plaintiff is entitled to additional interest.

For the reasons hereinafter stated, we hold that the court applied an improper measure of damages under Arkansas law to the facts of this case and reverse and remand. We affirm on the cross appeal except that we leave the issue of interest due on the judgment obtained and the propriety of allowing prejudgment interest open for determination by the trial court on the basis of Arkansas law.

In our prior opinion we agreed with the trial court that Arkansas law applies. We adhere to such view.

Many of the pertinent facts are set out in the prior reported opinions of the trial court and this court. In the case now before us the court found on the basis of the parties' stipulation that the Kerlin Field consists of 15,040 acres and that Young owns 169.1 acres in the field. We agree with such finding.

About 90% of the land in the field was leased or owned by Ethyl. Attempts to lease or acquire plaintiff's land were unsuccessful. Some 3,000 leases were involved. Many of the leases were in the record. Most of the leases provided for a royalty of ⅛th of the value of the brine at the wellhead.

While the issue of whether the trespass was innocent and in good faith is an issue raised by the cross appeal, we consider

it necessary to go into such issue here as it has a bearing on the damage award. The trial court properly held that the burden of proving good faith was upon Ethyl and that it has met such burden. We find there is substantial evidence to support such finding. Ethyl received advice from Texas and Arkansas attorneys that under Arkansas law the law of capture applied. It further determined that Ethyl had received permission from the Arkansas Oil & Gas Commission for the drilling location and operation of its injection and production wells. The opinion of Judge Harris, an able and experienced Arkansas Judge heretofore referred to, was found by Judge Williams to lend strong support to the present finding that the trespass was in good faith. The trial court specifically determined that the damages were to be determined on the basis of good faith trespass. We agree.

The trial court in its opinion stated that plaintiff contends he is entitled to the value of the bromine. The plaintiff contends that the total value of the bromine or sulphur removed from his land is $6,584,134. The trial court stated:

> While Ethyl forcefully urges that we are dealing with salt water or brine and its market value and royalty value, this Court specifically holds that we are dealing with minerals, bromine, ethylene dibromine, vinyl bromine and sulphur.

Ethyl contends that its technical knowledge and facilities for producing the end products from the brine belong exclusively to it. The trial court in its opinion states: "Mr. Young could hardly be expected to provide himself with a $45,000,000 facility and the expensive operation to process the brine to its end products." Plaintiff is in excess of eighty-four years of age and his background has been limited to farming. He has had no training in digging deep wells for brine or building highly technical plants for converting brine into sophisticated chemical products. Plaintiff made no contribution to the cost of digging the wells or erecting and operating the plants that produced the end products.

It is extremely unlikely that any outside person would be interested in producing brine on plaintiff's limited acrage surrounded by an existing field. We find no substantial evidence that the plaintiff could have properly operated and processed the brine on his land or leased it to others on a profitable basis. Plaintiff's own witnesses testified that it would have been inconceivable and a foolhardy venture for plaintiff to dig or operate a deep well on his 169.1 arce tract for the production of brine.

While plaintiff in his complaint sought the value of the bromine, the court in fixing damages awarded the value of the end products of the brine, less the cost of production, in the proportion that 169.1 acres bears to the 15,040 acre field. The court found that the entire 15,040 field produced the following end products:

Elemental bromine worth	$ 4,540,596
Ethylene dibromine worth	154,394,476
Vinyl bromine worth	14,087,900
Sulphur worth	1,605,467

The court determined that the cost of such production was $75,-021,000 which resulted in a profit of $6,622.84 per acre, making the profit on plaintiff's 169.1 acres $1,119,922.24 for which plaintiff was granted judgment. It further determined that Ethyl should pay plaintiff 169.1/15,040ths of its net profits as long as the Kerlin Field was in operation.

We find no support in the Arkansas cases or elsewhere for allowing plaintiff, under the facts of this case, a share of the profits of end products produced from the brine in the proportion which plaintiff's land bears to the entire field. Section 52.201, Ark. Stat. Annot., as amended, in pertinent part provides:

> The word "mineral" as used herein shall include oil, gas, asphalt, coal, iron, zinc, lead, cinnabar, bauxite, and salt

> water whose naturally dissolved components (solutes) are used as a source of raw materials for bromine and other products derived therefrom in bromine production.

Thus under Arkansas law salt water is a mineral and it is reasonable to treat damages for taking of salt water in the same manner as the taking of other minerals such as coal. Judge Miller in *National Lead Co. v. Magnet Cove Barium Corp.*, 231 F.Supp. 208, 221 (W.D.Ark. 1964), reviewing Arkansas and outside authorities, holds:

> The court is also of the opinion that the proper measure of damages is under the Arkansas law the in-place value for the ore removed and disturbed because of an innocent or non-wilful trespass. Within the general principle of the in-place value measure of damages, the court must attempt to place the injured party in such a position as it would have been had not the injury occurred. Of course, this attempt to make the injured party whole is the underlying basis for compensatory damages. As to a landowner who has not the opportunity nor the equipment to develop minerals, the amount for which he can lease them, or royalty value, is the generally accepted measure of damages as to him for an innocent trespass and conversion of minerals.

In *Parnell, Inc. v. Giller*, 372 S.W.2d 627 (Ark. 1963), which involved salt water, the court held:

> The royalty payable to the lessor is computed upon the market value of the salt water at the well.

In *Ward v. Spadra Coal Co.*, 272 S.W. 353, 355 (Ark. 1925), the court determined that the measure of damages to the injured party whose coal was taken as a result of a good faith trespass was the in-place value of the mineral. The court goes on to say:

> The evidence in the record tends to show that the royalty usually paid in that locality for mining coal where the machinery and equipment was not considered was 10 cents for

> slack coal, and 15 cents for hard coal. This evidence is not disputed and should have been taken by the chancellor in fixing the value of the coal taken.

As heretofore pointed out, there are a considerable number of leases in the record, most of which reflect a royalty of ⅛th of the market value of the salt water at the wellhead. The plaintiff in 1965 executed a lease, which apparently has terminated, to a party not here involved, on the land here in dispute providing for royalty on minerals including salt water, of ⅛th of the value of the brine extracted from the land at the wellhead. The court determined that the value of the brine at the wellhead was 2 to 5 cents a barrel. A 5¢ market value would provide a royalty of less than 1 cent a barrel on the 7,612,000 barrels of salt water the court found had been appropriated, which would establish damages considerably less than $76,000.

There is authority in Arkansas and elsewhere that the in-place value of the mineral, less the cost of bringing it to the wellhead or the surface, is the appropriate measure of damages. Such measure would likewise fall far short of the damages awarded. *National Lead* and Arkansas Supreme Court cases indicate that if the taking is wilful and in bad faith the measure of damages is the value at the wellhead without deducting any cost of bringing the mineral to the surface. Thus even under the bad faith rule using the maximum surface value of 5 cents per barrel, the total damages would approximate $380,000.

Burbridge v. Bradley Lumber Co., 239 S.W.2d 285 (Ark. 1951), relied upon by the plaintiff, is clearly distinguishable. In that case timber on the surface was appropriated and cut into railroad ties. The court determined that no great skill or capital was needed in converting the timber to ties and that plaintiff would have been able to provide such service him-

self. Such is certainly not the situation under the facts of this case.

As heretofore set out, plaintiff provided neither capital nor skill needed to produce the end products upon which the court based its award.

Moreover, there is no basis in Arkansas law to compel unitization of the field. In *Dodson v. Arkansas Oil & Gas Commission*, 235 S.W. 2d 33, 36 (Ark. 1950), the court held:

> We think it clear that the legislature has not yet undertaken to empower the Commission to direct the unitization of this entire field.
>
> Nor may the courts achieve this result without statutory authority.
>
> * * * * * * *
>
> We conclude that at present the goal of field-wide unitization can be reached only by voluntary co-operation.

In *Budd v. Ethyl Corp.*, 474 S.W.2d 411, 413 (Ark. 1971), the court held:

> But there has been no unitization with respect to the 240-acre tract in which the appellant owns an undivided mineral interest; and furthermore, we find no authority in the Oil and Gas Commission to order the unitization of salt-water operations that have no bearing upon the extraction or conservation of oil or gas.

We are convinced that the court, upon the basis of Arkansas law, applied an inappropriate measure of damages in awarding the judgment. We leave the matter open for the trial court to determine on the basis of Arkansas law whether the royalties value or the value of the salt water at the wellhead, less the cost of bringing it to the wellhead, is the proper measure of damages. Under either of such measures of damage, the judgment award here is grossly excessive. We also leave open the question of whether any brine has been removed from plaintiff's land since July 1, 1976. If so, the damages therefrom can be left open for determination on the basis of an appropriate measure of damages.

What has heretofore been said disposes of defendant's appeal and hence it is unnecessary to consider the additional points raised. On plaintiff's appeal, the judgment is reversed and the case is remanded for further proceedings not inconsistent with the views expressed in this opinion.

With respect to the cross appeal, for reasons heretofore stated, we affirm the court's holding that the taking was in good faith and reject the contention that plaintiff is entitled to a proportionate share of the ultimate products made from the salt water. We leave open the issue of prejudgment and postjudgment interest that should be awarded upon any judgment entered in accordance with the Arkansas law.

Reversed and remanded upon defendant's appeal; affirmed on plaintiff's cross appeal except that the interest issue is left open for determination under Arkansas law upon the amount of damages awarded.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

Judgment

(Filed August 8, 1978)

United States Court of Appeals
For the Eight Circuit
No.

September Term, 1977

J. M. Young, Appellee,

vs.

Ethyl Corporation, Appellant,
Great Lakes Chemical Corporation,
Calvert Exploration Company, and
Bromet Company.

Appeal From the United States District Court for the Western District of Arkansas.

This Cause came on to be heard on the record from the United States District Court for the Western District of Arkansas and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court.

August 8, 1978

APPENDIX C

Judgment

(Filed August 8, 1978)

United States Court of Appeals
For the Eighth Circuit

No.

September Term, 1977

J. M. Young, Appellant,

vs.

Ethyl Corporation,, Great Lakes Chemical Corporation,
Calvert Exploration Company and Bromet Company,
Appellees.

Appeal From the United States District Court for the Western District of Arkansas.

This Cause came on to be heard on the record from the United States District Court for the Western District of Arkansas and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed, except that the interest issue is left open for determination under Arkansas law upon the amount of damages awarded.

August 8, 1978

APPENDIX D

IN THE

UNITED STATES COURT OF APPEALS

EIGHTH CIRCUIT

No. 77-1829

J. M. YOUNG,
Plaintiff-Appellee, Cross Appellant,

versus

ETHYL CORPORATION, et al.,
Defendant-Appellant, Cross Appellee.

Appeal from United States District Court for the
Western District of Arkansas
Honorable Paul X. Williams, District Judge

PETITION FOR RE-HEARING BY PLAINTIFF-APPELLEE, CROSS APPELLANT, J. M. YOUNG

(Filed August 31, 1978)

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PETITION FOR REHEARING

Now comes J.M. Young, the Plaintiff-Appellee, Cross Appellant in the foregoing styled cause, and shows the court that he is entitled to a rehearing by the court and reconsideration of the decision, filed August 8, 1978, after oral arguments were heard by the Honorable Judges Van Oosterhout, Lay and Van Pelt. The Plaintiff-Appellee, Cross Appellant shows he is clearly entitled to a rehearing based on the following: (1) THIS PANEL OF THE COURT HAS USED CLEARLY ERRONEOUS MATERIAL FACTS; (2) THIS PANEL OF THE COURT HAS USED CLEARLY ERRONEOUS LAW, OR MISCONCEPTIONS OF LAW; (3) THIS PANEL OF THE COURT HAS HELD CONTRARY TO A DIFFERENT PANEL OF THE SAME COURT IN THE SAME CAUSE OF ACTION; and (4) THE PLAINTIFF-APPELLEE, CROSS APPELLANT HAS BEEN DENIED A FAIR AND IMPARTIAL HEARING.

STATEMENT OF CASE

Th Eighth Circuit in the case of *Young v. Ethyl Corp. et al*, 521 F.2d 771 reversed Hon. Oren Harris and declared Defendants trespassers and "remanded for further proceeding as to the relief to be granted."

Hon. Paul X. Williams proceeded with the case, while ruling throughout the trial that Plaintiff had all burdens of proof.

Hearing was terminated January 28, 1977. On date of decision, February 23, 1977, Judge Williams gave judgment of $1,119,922.24 for past damages and a future accounting. On that date he announced that he had decided Defendants had the burden of proof.

The panel reversed Judge Williams and directed the trial court to find royality on brine.

The petitioner (Plaintiff-Appellee, Cross-Appellant) prays this Court for a rehearing for reasons hereinafter set out.

ERRORS OF FACTS

1.

Panel Erred in Finding That Ethyl's Leases Provided A ⅛ Royalty on Brine

The panel grossly erred as to the material contents of Ethyl's lease. One erroneous finding is that "most of its leases provided a royalty of ⅛th of the value of the brine at the 'wellhead'."

The lease was a combination of oil, gas, and minerals. It never provided a "wellhead" point on either oil, gas, minerals, nor saltwater (brine). The lease was exhibited in D-X-2 of App. Vol. VII. Also exhibited in the Complaint and in P-X-2 of Appeal No. 74-1775 (the first appeal).

The field and plant supervisor boastingly said that all of its leases provided $10.00 per acre "in lieu of" royalty on saltwater. But paid no royalty on saltwater. The field and plant superintendent testified that all of their leases were identical (App. Vol. II, pp. 327-328, 331, Tr. Vol. II, pp. 276-280, also D-X-2, App. Vol. VII, App. Vol. II, pp. 377-378, of Appeal No. 74-1775, being made a part of the evidence of the last trial).

Mr. Young objected to the lease for several reasons—one being that Ethyl could release a part or all of the acreage and keep on producing and stop paying "in lieu of" royalty.

2

The Panel Erred as to the Contents of the Hunter Lease

The panel erroneously found that the Hunter lease Mr. Young signed provided a "royalty on minerals including saltwater of ⅛th of the value of the brine extracted from the land at the

wellhead." (Page 7 of copy of opinion filed August 8, 1978.) There is an error in this statement. The lease is exhibited in Appeal No. 74-1775, App. Vol. II, p. 307, Tr. Vol. II, p. 256. The provisions as to minerals reads as follows:

> "On all other minerals or kindred products mined, manufactured and marketed, ⅛ either in kind or value at the well or mine *including saltwater or a mineral contained in saltwater.*"*

The important things about this are two:

> This said "mined, manufactured and marketed". It did not say "or". The conjunction was "and". It means one thing—after it is manufactured it is marketed. If not *marketed* then there will be no royalty under the Hunter lease.

Provisions of instruments should be interpreted to determine the best and most logical reasoning, and not for the worse and unreasonable meaning. This lease was erroneously interpreted punatively against the Plaintiff Young.

That lease provides if something is returned to the ground to recycle, it will not be considered as a product.

The intent of this lease is opposite from the panel's interpretation of its wording and intent.

3

The Panel Erred in Holding Brine to Be the Product of Ethyl's Operation

To get a logical viewpoint of Ethyl's products we will quote from the two men in charge of the field and plant. This testimony was taken in the first hearing when Defendant-Appellant,

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* Emphasis ours.

Cross-Appellee was trying to prove it was operating under the law of capture. In the Appendix of Appeal No. 74-1775 (App. Vol. II, p. 307, Tr. Vol. II, p. 256) is Mr. Beeson on direct examination by Ethyl's able attorney:

Q. "Is it practical to operate a brine field without a plant to extract the bromine from the brine that you produce?

A. "Obviously, it's not. *This has to be viewed as a closed-circuit operation. There is involved, fundamentally, in the operation producing wells, collection lines to move the brine into a plant where the bromine is extracted; and then the brines are reinjected. It's obviously different from oil and gas industry or the oil industry where the oil is produced to the surface and has a market at that point. Without the plant there wasn't a market.*"*

On the same page Ethyl's attorney, by leading questions, got Mr. Beeson to say that *the field and plant are hand in hand and are "inseparable".** Mr. Beeson said it was *different from oil.** He said the *entire pattern of leases, field and plant operations were "unique".** (Appeal No. 74-1775, App. Vol. II, p. 309, Tr. Vol. II, p. 258) Therefore, it cannot be compared to oil, gas, or ores, as claimed now by Ethyl.

The above description and conclusions by Mr. Beeson were on all-fours with the facts and conclusions of the Sixth Circuit in *Dow Chemical Co. v. Commissioner of Internal Revenue*, 433 F.2d 283 (U.S. 6th Cir. Ct., 1970). After Ethyl has taken depletion under this ruling it now wants to defeat Mr. Young by claiming the opposite.

The admissions of Mr. Madden, the other field and plant supervisor, added to what Mr. Beeson said about the plant being

* Emphasis ours.

the "wellhead" of the operations. In the first appeal (No. 74-1775 App. Vol. I, pp. 138-139, Tr. Vol. I, pp. 87-88) beginning on line 10:

Q. "Then I want to ask you something about the—when you were locating your plant there, when you were drilling the wells, you knew there were no value or no market for brine or salt water with bromines in it, didn't you?

A. "There was no market in the usual commercial sense for it, no.

Q. "Yes, sir. So, then, the only market that it would have had was in the finished product that you finished at your plant when you got through manufacturing? You first extracted it from the water, don't you?

A. "That is right.

Q. "And up until then you had no market value whatsoever, did it?

A. "No. You can't—it's pretty hard to sell salt water."

By the above statements of the two superintendents of the field and plant operations they are saying the manufacturing plant is the "wellhead" of their operations.

In fact in Ethyl's Reply Brief on page 20 reads:

*"Appellant is not in the business of selling brine."**

If A owned 40 acres of land with one solid rock imbedded with small nuggets of gold, and someone, as trespasser, with machinery capable of crushing and recovering the gold from the crushed rock should recover $40,000,000.00 worth of gold, what would be A's recovery? Would it be ⅛th of the crushed

* Emphasis ours.

rock? Would it be the crushed rock that was left on his land? Or, would it be out of the recovered gold?

Dow Chemical Co. (supra,), said of such:

> "We doubt that crushed ore in gold, silver, or other such mining, even though found to be ready for some industrial use, would mark the cutoff point for such miners."

The Sixth Circuit in *Dow* said Dow is "a miner of bromine, but not a miner of brine."

To offset sound and reasonable decisions, Ethyl used the case of *National Lead Co. v. Magnet Cove Barium Corp.*, 231 Fed. Supp. 208 (W.D. Ark. 1964). This case and *Ward v. Spadra Coal Co.*, 272 S.W. 353 were cases in which plaintiffs and defendants were lessee-operators. Since the lessee has no title his position is different from the landowner who holds the title. This case should not have been tried nor decided under the reference to Arkansas cases as to ore. One case cited was *Ark. Power & Light Co. v. Decker*, 179 Ark. 592, 17 SW 2d 293 (1929).

4

Ethyl Profited on Hunter Co's Lease

The only one to benefit from the lease Mr. Young signed to Hunter Co. was Ethyl. Hunter Co. drilled an oil well on Ethyl's lease adjoining Mr. Young's land on which Hunter had the lease. The contract Ethyl made with Hunter was that Hunter would have no interest in the bromines nor Smackover Formation. He was to drill for oil a few hundred feet above the Smackover (Appeal No. 74-1775, App. Vol. I, p. 145; Tr. Vol. I, p. 94). So, Ethyl got a free bromine well, known as Ethyl's Well 18-A.

5

Due to Error of Facts the Wrong Law Was Applied

The above errors of facts caused the panel to select and apply the inapplicable law. This caused the panel to violate a cardinal principle of law. The cardinal principle of law being that a wrongdoer can reap no profit from his wrong. It severly punished the innocent landowner and gave what he had to a wrongdoer. This action by the panel licensed the oppresser to take other people's property.

6

The Panel Vested the Trespasser With the Right of Eminent Domain

Both the Constitutions of the United States and Arkansas gave the right to take private property for public use; but with the duty to pay "compensation." The decision and holding of this panel grossly exceeded the granting of the right of eminent domain to a private concern; but gave it the right to set the compensation. It can now take anything it wants, regardless of value, and set the price.

The case of *Tidewater Oil Co. v. Jackson*, 320 F.2d 157 (10th Cir. 1963), held tht if the public has to pay full compensation for a legal taking, the illegal taker should not be treated better.

In *Robert v. Williams*, 15 Ark 43 (Ark.), says an individual's property cannot be taken for private use, even if compensated.

Young v. Gurdon, 275 S.W. 890, 169 Ark. 299 (Ark. 1925), held that just compensation for taking private property was the

best and highest use to which the propery could be put, including contemplated improvements. This case declared correlative rights for Arkansas.

7

The Panel Erred in Punishing Mr. Young for Not Signing Ethyl's Lease

The panel expressed a disfavor toward Mr. Young for not signing Ethyl's lease. The lease was bad for many features, including the right to drop the lease at any time of operations and discontinue "in lieu of" royalty payments.

Even though the panel set a pitance for royalty under its purported contract it denied him the lease bonus that is paid for a lease.

This decision will intimidate all landowners into a stage of depression. At *page 809 of 86 C.J.S.* the pressure of coercion and intimidation are pointed out when courts permit a person to be oppressed by someone with power and means to do so.

> "In modern law it is recognized that fear of property loss or economic loss, or loss of other substantial rights or privileges, is as effective means of compelling a person to act against his will as fear of bodily harm. The fact that a choice is made between comparative evils does not exclude duress."

The comparative evils are these:

(1) The landowner can sign the onerous lease proffered by Ethyl (or anyone else), or

(2) Suffer the confiscation of his property without compensation.

By Defendants' admission they have made a profit of approximately $2,000,000.00 from the bromine from Mr. Young's land. If a big company can take that much against the will of the owner and compensate him less than $50,000.00, the sense of justice in this country leaves much to be desired.

Should the decision and holding of this panel be sustained, then the fear that is gripping the public is affirmed. That fear has been generally stated by the public as follows:

> "Just let them have what the big corporations want, for if you don't they'll beat you down in court and take it anyway."

This thought has now horrified Mr. Young and others.

The obvious errors of facts were used by the panel to create a contract between the parties. This was in gross error since courts cannot create contracts.

Arkansas Valley Smelting Co. v. Belding Mining Co., 8 S.Ct. 1308, 127 U.S. 379, 32 L.Ed. 246.

Or, he can refuse to contract.

H. D. Watts Co. v. American Bond & Mortgage, Co., 166 N.E. 713, 267 Mass 541, 84 A.L.R. 12.

Dodson v. Wade, 101 S.W.2d 182, at page 185, 193 Ark 534.

8

The Panel Erred in Holding That the Trial Court Created a Unit

The trial court never attempted to create a unit. It merely used the Defendant's operation of the field in conjunction with

the plant as a method to give what it thought was just. The panel never recognized the de facto unit operated by Defendants.

Cornelius v. Ark. Oil & Gas Commission, 402 S.W.2d 402, 240 Ark. 791. *Pan American Pet. Corp. v. Candelaria*, 403 F.2d 351 (10th Cir. 1968).

The Defendant-Appellant, Cross-Appellant admitted a field-wide unit operation in their brief at page 5, 3rd paragraph which said: "However, the evidence showed that the field must be operated as a whole."

9

The Contract Created by This Panel Is Void

Arkansas law says courts cannot make contracts.

Hanna v. Johnson, 344 S.W.2d 846 (Ark. Supreme Court).

10

The Panel Reversed the Eighth Circuit

The Eighth Circuit in *Young v. Ethyl et al.* (supra), ruled that the Defendant could not use the rule of capture as a license to plunder. This panel has now issued that license, thus reversing the Eighth Circuit.

11

The Panel Erred in Finding "Good Faith"—Opinion of Attorney Cast Bad Faith on Ethyl

Since the trial court erroneously placed the burden on Petitioner (plaintiff) to prove "bad faith" on the part of Ethyl, it

gave free wheeling to Ethyl to make insinuations implying a compliance as to the rule of capture.

One letter introduced was D-X-11. It suggested further study. The thrust of the entire issue lies in exact wording of D-X-12, page 10, section 2. This letter and purported opinion are in App. Vol. VII. Mr. Patterson, chief counsel with Baker & Botts, sent a copy of his letter and opinion to Mr. Fred Warne, chief counsel for Ethyl. Paragraph 2 reads:

> "The rule of capture applies to the production of salt water. If we may assume that the subsurface salt water in our case is in natural suspension and not in a salt dome as a hard mineral, and that the subsurface water in which the salt is suspended is not a defined and charted underground stream, the rule of capture would allow the production of unlimited, *or at least nonwasteful, quantities of salt water by the leasing of only one tract without liability to the owners of surrounding tracts for drainage.*" (Emphasis ours)

Ethyl has attorneys surpassed by none. All of them know that "what comes into the well" is the law of capture. They also know what is forced in does not drift, or "come" in. So, the opinion said "leasing only one tract". That means if any salt water from any other tract will have to "come into the wells on that one tract", this is the rule of capture. This was defined in the case of *Young v. Ethyl et al.* (supra), in which the 8th Circuit very effectively and correctly passed on this point.

The opinion also warned Ethyl about "correlative rights" in the same sentence. It merely said that by leasing *only one tract* it would not be liable for unlimited production that was not wasteful. This is merely saying not to take so much as to damage the reservoir. All the law, on both the law of capture

and correlative rights, is couched in this clear language. This was well described in *Young v. Ethyl Corp., et al.* (supra).

Ethyl drilled wells on 36 tracts in the common pool and used the most complete hydraulic system known, by which it controls the entire reservoir. Ethyl's acts clearly admit it openly and intentionally violated the clear instruction in the letter from Mr. Patterson (D-X-12). After D-X-12 was introduced Ethyl should not have been allowed to offer any other evidence since the written evidence was conclusive.

Ethyl never placed Mr. Davis, their El Dorado, Arkansas, attorney, on the stand, yet its well trained counsel offered just enough evidence to mislead the trial judge. If the trial judge had placed the burden of proof on the Defendants, the full truth could have been brought out.

Defendants' witness Madden said he did not discuss the situation with Mr. Davis, but "merely assumed" he agreed with their Texas attorneys Baker & Botts.

On page 38 of Ethyl's brief, Ethyl admitted the error of burden of proof rested on Defendants, but Plaintiff was charged with it; and now a remand for fair trial is in order.

The rulings on burden of proof are in the record. App. Vol. I, pp. 671, 674-677, 694-699, 1074-1075. On pp. 674-677 the Plaintiff asked Ethyl to show or produce proof of what it sold and the trial court said this request "gagged" the court since Plaintiff had the burden of proof to prove his damages.

This is similar to a criminal case in which the court holds the defendant must prove his innocence. After he is executed the court announces that the State had the burden to prove guilt. It was too late for the convicted person; but it is not too late to remand this case for a new trial as to burden of proof.

12

The Panel Discriminated Against Poor and Aged

In the oral argument one member of the panel suggested that Mr. Young's age (now 88) had nothing to do with the merits of the suit. In its opinion the panel said that due to the age and lack of wealth by Mr. Young to have built a like operation he cannot recover at the point one could recover if able to operate as the trespasser could. Yet, the original plant of $7,500,000.00 could easily have been built with sales of Mr. Young's mineral products.

This violates his rights given to him under Article 2, Sections 2, 3, 13, and 22 of the Arkansas Constitution and the United States Constitution, Amendments 5, 9, 13, and 14.

13

The Panel Erred in Holding Mr. Young Should Have Participated

Defendant Ethyl's witnesses testified that neither Mr. Young nor Hunter Company, his lessee, would have been accepted for participation in the project. (Appeal No. 74-1775, App. Vol. I, p. 142, Tr. Vol. I, p. 91; App. Vol. II, p. 373, Tr. Vol. II, p. 322)

Mrs. Sue Jameson offered to make full participation before wells were drilled near her property. She was refused. (App. Vol. I, p. 119, Tr. Vol. I, p. 68, Appeal No. 74-1775. Also Appeal No. 74-1775, App. Vol. I, pp. 101-105, Tr. Vol. I, pp. 50-54)

Ethyl kept all its plans a secret. Since the movant has the secrets, he should reveal them to a prospective participant. It

could be compared to the man who killed his parents and begged mercy since he had just recently become an orphan.

Mr. Young should not be punished for trying to avoid a futile act. This would be like unto a man hauling away his neighbors corn. If the neighbor does not go to him before hand and offer to pay the expenses of the stealing he could not recover his corn.

14

The Panel Erred by Misapplying Pertinent Rules of Law

The panel failed to recognize applicable law. It failed to recognize that the cases it used to define royalty were not applicable to the case at bar.

The *National Lead case* (supra) is a decision by a Federal District Court and is not by the highest court of the state.

The District Judge cannot establish a precedent for the state to qualify under *Erie*.

The *National Lead* case (supra) (which was dicta on royalty) was 14 years after *Burbridge v. Bradley Lbr. Co.*, 218 Ark. 897, 239 SW 2d 285 (Ark. 1951) and its dicta will not control. 67 F. 297, 50 C.Ct. 440, 291 U.S. 665, 78 L.Ed. 1056. Dicta does not constitute a rule by a court. *Buder v. N.Y. Life Co.*, 107 F. 2d 705. An actual decision is necessary. 36 *C.J.S.*, §175, p. 412. A decision of the states highest court construing its prior decision is binding on the Federal Court. *Burbridge* (supra) overruled the *Deckers* case as being opposed to its rules of Arkansas law. The panel classified brine as being a minerl by statute. That statute was enacted in 1975, 11 years after Ethyl's leases were taken.

CONCLUSION

Due to the panel's erroneous conclusion of fact, together with its erroneous misapplications of facts and law, and the exceptionally important and destructive results the decision will have on the constitutional, legal, and personal rights of the Plaintiff Young and other people to own, use, possess and enjoy their property the decision should be overruled, and the matter be heard again together with oral argument, and judgment of District Court be affirmed, or a judgment entered giving proper relief to Petitioner.

Respectfully submitted,

ROBERT J. MOFFATT
CHAMBERS & CHAMBERS
/s/ MELVIN T. CHAMBERS

Certificate of Delivery

Two copies of the within petition were personally delivered to Paul C. Crumpler, attorney for Ethyl Corporation, on this 30th day of August, 1978.

/s/ MELVIN T. CHAMBERS

APPENDIX E

IN THE

UNITED STATES COURT OF APPEALS

EIGHTH CIRCUIT

No. 77-1829

J. M. YOUNG,
Plaintiff-Appellee, Cross Appellant,

versus

ETHYL CORPORATION, et al.,
Defendant-Appellant, Cross Appellee.

Appeal from United States District Court for the
Western District of Arkansas
Honorable Paul X. Williams, District Judge

SUGGESTION FOR A REHEARING EN BANC

(Filed August 31, 1978)

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Attorneys for Plaintiff-Appellee,
Cross Appellant

In the United States Court of Appeals
For the Eighth Circuit

Nos. 77-1807 and 77-1829

J. M. Young,
Plaintiff-Appellee,
Cross-Appellant,

v.

Ethyl Corporation,
Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court for the Western District of Arkansas, El Dorado Division

SUGGESTIONS FOR A REHEARING EN BANC

NOW BEFORE THE COURT comes J. M. Young, Plaintiff-Appellee, Cross Appellant in the styled cause and respectfully suggests and shows the court that a rehearing en banc should be granted.

1

This cause was originally argued and submitted to the 8th Circuit Court of Appeals on February 14, 1975 before a panel composed of Judges Heaney, Webster and Nangle. Decision of this panel of the court was rendered and filed on July 25, 1975 wherein the trial court was unanimously reversed and the case remanded by this panel of the court. *Young v. Ethyl*, 521 F. 2d 771 (1975).

2

After remand, this cause has subsequently been brought to this court for the second time before a panel of the court composed of Judges Van Oosterhout, Lay and Van Pelt. This cause

was argued and submitted before the judges on May 16, 1978 and their decision rendered and filed on August 8, 1978, reversing and remanding.

3

The initial panel of this court, after unanimously reversing the trial court, placed the parties to this cause herein in a victim-trespasser relationship. The latter panel of the court has unanimously reversed the trial court and placed the parties in the lessor-lessee relationship.

4

The initial panel of this court has ruled the issues, as set forth in this cause, have not been determined by the Supreme Court of Arkansas. The latter panel of this court has declined and refused to recognize that pronounced feature as held and set forth by the original panel of the court.

5

Under the decision of the latter panel, the trespasser has been given an unvarnished license to confiscate and steal the property of the plaintiff without compensation, at the same time permitting the trespasser to enjoy a prohibited profit from his acts of trespass, as heretofore defined by the previous panel of this court.

WHEREFORE, Plaintiff-Appellee, Cross Appellant J. M. Young shows he has filed a Motion for a Rehearing and simultaneously therewith suggests, for reasons set forth above and in the attached memorandum brief accompanying this suggestion

and in his Motion for a Rehearing, that the 8th Circuit Court of Appeals rehear this matter en banc.

Respectfully submitted,

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/s/ By MELVIN T. CHAMBERS
MELVIN T. CHAMBERS

Attorneys for Plaintiff-Appellee, Cross-Appellant.

MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFF'S SUGGESTION FOR REHEARING EN BANC

Statement of the Case

1

This cause was originally heard in the United States District Court for the Western District of Arkansas before Judge Oren Harris. Judge Harris ruled in favor of the defendants and dismissed the complaint after a trial on the merits—*Young v. Ethyl Corporation, et al.*, 382 F. Supp. 769 (1974). The plaintiff-landowner appealed to the 8th Circuit Court of Appeals, and said appeal was argued and submitted before Judges Heaney, Webster and Nangle. Judge Harris was unanimously reversed and the case remanded—*Young v. Ethyl Corporation*, 521 F. 2d 771 (1975).

2

After remand, Judge Harris declined to set a hearing after a motion made therefor by the plaintiff. Subsequently, the plaintiff moved that Judge Harris recuse himself because of the appearance of an improper influence upon the court by his law clerk's family relationship with the defendants. Initially, Judge Harris declined to recuse himself, but on reconsideration did so and transferred the case to the Chief Judge for the Western District of Arkansas, the Honorable Paul X. Williams, for disposition. After lengthy evidentiary hearings for the determination of damages for which the trespassers were to be accountable, Judge Williams rendered a decision awarding the plaintiff-victim $1,-119,922.24. The damages were to be taken from the profits heretofore acquired by the trespassers for the minerals which these Defendants-Trespassers have confiscated from the plaintiff-landowner.

3

After the disposition of this cause, and assessment of damages by the trial court, the defendants-trespassers appealed and the plaintiff-landowner filed a cross appeal. The position of the plaintiff-appellees, cross-appellant was, and is, that the trial court made repeated errors of material facts and omissions that denied the plaintiff-appellee, cross appellant the full measure of recovery to which he was entitled for the value of the valuable minerals confiscated from him by the trespassers-defendants, all as shown by the original brief of the plaintiff-appellee, cross appellant to the panel of Judges Van Oosterhout, Lay and Van Pelt.

4

This cause was again argued before a panel of the 8th Circuit Court of Appeals made up of Judges Van Oosterhout, Lay and

Van Pelt on May 16, 1978. Their decision, rendered and filed on August 8, 1978, reversed the award made by the trial court. A separate Motion for a Rehearing is filed simultaneously with this Suggestion for a Rehearing en banc.

ARGUMENT

1

The panel that heard the case on appeal made gross errors in finding of facts and law on which it based its decision. Their decision is in direct contradiction to 8th Circuit Court of Appeals in *Young v. Ethyl Corporation, et al.*, 521 Fed. 2d 771 (8th Cir. 1975).

2

The latest panel of the court (on bottom of page 3 and top of page 4 of their decision) filed August 8, 1978 found that the majority of the leases obtained by Defendant-Appellant, Cross-Appellee, known as Ethyl, "provided for a royalty of ⅛th of the value of the brine at the wellhead." This is an absolute error in its entirety!

The sole and only lease form used by Ethyl in assembling its original block was a combination lease for oil, gas and minerals and other things extracted out of salt water. The royalty on the oil was ⅛ of what was "produced and saved." The royalty on gas was ⅛ of what gas was "sold and used off the leased premises." As to salt water and minerals extracted from salt water, the lease gave no royalty, but gave $10.00 per acre per year "in lieu of" royalty.

"Wellhead" wasn't mentioned in the lease at any place; and certainly not as to salt water and things "extracted" from it. A

fixed sum is not a royalty. The $10.00 per acre per year was "in lieu of" royalty as stated in the lease.

A true copy of the lease is P-X-C of Vol. III, Appeal No. 74-1775; and also P-X-2 of Vol. III of Appeal 74-1775; also D-X-6 of Vol. III of Appeal No. 74-1775.

It was also exhibited in D-X-2 of App. Vol. VII of this appeal. The only time the panel could have heard of ⅛ of brine was in the oral argument by Ethyl's attorney.

In the first hearing (Appeal No. 74-1775) Ethyl's witnesses testified that all of its leases were identical, especially as to the $10.00 acre per year "in lieu of" royalty. (App. Vol. II, pp. 327-328, 331; Tr. Vol. II, pp. 276-280). The proceedings, appendix and exhibits in Appeal No. 74-1775 were made a part of this suit.

The panel used its misunderstanding as a reason for its creating a lease contract between Mr. Young and Ethyl and fixing Mr. Young's recovery on ⅛ of brine.

Therefore, the error of the panel has caused it to err in the applicable law.

3

The panel erred in finding that the oil and gas lease Plaintiff Young executed to the Hunter Company provided a royalty of "⅛ of brine at the wellhead." This, too, was in absolute error! That lease provided royalties only what was manufactured and marketed or used off the leased premises.

Therefore the panel erred in its interpretation of the lease instrument in trying to create a lease contract between the Plaintiff and Defendants. Plaintiff has never executed a lease in favor of the Defendants-Trespassers.

4

The panel held that the case was tried under a ruling that the burden of proof to establish "good faith" rested on the Defendant. This was in error. The only time the trial court announced that rule was February 23, 1977. The case was tried under rulings that Plaintiff had burden to prove "bad faith" and damages. This burden was exercised against Plaintiff throughout the entire trial, thus denying him his "day in court."

Proof of the trial court's outstanding errors are evidence of such ruling on burden of proof, App. Vol. I, pp. 671, 674-677, 694-699, 1074-1075.

The case of *Halper v. Browning, King Co., Inc.*, 325 F. 2d 644 (D. C. Cir. 1963) held:

> "Since the case was tried under a misapprehension by the parties as to their respective burdens of proof, the judgment should be opened and additional testimony taken on the ground of deductions. See Rule 59 (a), F. R. Civ. P."

5

The trial judge and the panel refused to interpret, or erred in, the interpretation of, law of capture in D-X-12, of App. Vol. VII. Defendants claim to have complied with the purported opinion to become "good faith" trespassers, but its obvious failure to comply makes it a "bad faith" trespasser. One member of the panel remarked at the hearing on oral argument that two district judges' "good faith" ruling was enough for him.

On page 10, Section 2, of D-X-12 specifically advised Defendant-Appellant, Ethyl Corporation, to drill on only one lease to comply with the law of capture, and to then not overproduce from that lease. Ethyl drilled 36 wells in the field and set up the most effective hydraulic system known. This

was in strict violation of the law of capture. This is obviously an oversight on the part of the trial court and the panel as to what constitutes the law of capture, and the law of correlative rights. The opinion fits hand and glove with the definition this court gave in the case of *Young v. Ethyl Corporation, et al.*, 521 Fed. 2d 771 (8th Cir. 1975).

It is obviously clear that the attorneys' opinion (set forth as D-X-12) advised Ethyl Corporation not to violate the law of capture, and set out what steps to follow to avoid the violation of it. Yet, it is crystal clear to anyone who knows what constitutes the rule of capture to see that Ethyl (a) was advised what to do to avoid a violation, and (b) that Ethyl violated the opinion and violated the rule of capture.

6

The ruling of the panel is in direct conflict with this court's ruling in *Young v. Ethyl* (supra).

In the first appeal (No. 74-1775) this court held that the rule of capture would not be used as a license to plunder. This panel, by its obvious errors of finding of facts and holdings of law, have now issued that license to Defendant, Ethyl.

The member of the present panel who remarked at the hearing on oral argument that if two trial judges had held "good faith" it was enough for him, evidently relied on that and never examined the records to see if they erred.

7

Defendant admitted its plant was the "wellhead" of its operations and there was no market for brine. That it was merely an agent of transportation; yet the panel obviously committed an

error in holding contrary to all facts in the record, including voluntary admissions.

It is obvious the panel ignored the true facts of the operations.

8

The panel has obviously granted the rights of eminent domain to a private corporation, with the further impulsive flavor of setting the value to such low levels as to shock the conscience.

The decision of the panel, if allowed to stand, confirms what the general public slogan of "Better give the big corporation what they want or they'll drag you through court so long, they'll get it anyway."

If this ruling is not changed the people will be under economical and judicial slavery to the big corporations.

This thought has now horrified Mr. Young and others.

9

The panel made very obvious errors in its conclusions of facts, and applied laws not applicable to the true facts.

10

The decision of the panel destroys all constitutional rights of property ownership and means of protecting the same.

The legal consequences involved herein are of exceptional importance in regards of owning, possession, and using or enjoying property. If the decision of the panel should not be reversed then the rights of contract is a thing of lip service only. The panel decision denies any means of protection of property rights.

The panel created an involuntary servitude or worse yet the power to force a person to sign any kind of lease, upon any terms, or forfeit what he has to the power laden aggressor.

11

This court very affirmatively stated that the Arkansas Supreme Court had *not* yet held in a cause with issues as presented by the subject case in *Young v. Ethyl Corporation, et al.*, 521 F. 2d 771 (1975) at page 773:

> "When pressed on the issue in oral argument, counsel for the defendants conceded that the Arkansas Supreme Court has *not* yet held that relief for an owner in fee simple is barred by the rule of capture when minerals beneath his land are forced to migrate to the property of another by means of the other's injection wells." (emphasis ours)
>
> and
>
> "Since the issue *has not been determined* by the highest court of the state, it is our task to rule as we believe the Arkansas Supreme Court would rule, were the matter squarely presented to it." (emphasis ours)

Further, this court in *Yoder v. Nu-Enamel Corp.*, 117 F. 2d 488, 489 (8th Circuit 1941) quoted at length in *Young v. Ethyl Corporation, supra,* in Footnote 4 at pages 773, 774:

> "When the rights of a litigant are dependent on the law of a particular state, the court of the forum must do its best (not its worst) to determine what that law is. It must use its judicial brains, not a pair of scissors and a paste pot. Our judicial process is not mere syllogistic deduction, except at its worst. At its best; it is the wise and experienced use of many sources in combination—statutes, judicial opinions, treatises prevailing more, custom, business practices; it is history and economics and sociology, and logic,

> both inductive and deductive. Shall a litigant, by the accident of diversity of citizenship, be deprived of the advantages of this judicial process? * * * *We must not forget that a litigant has only one day in court.* * * * * * * Each litigant, whether in the federal or the state courts, *has a right that his case shall be a part of this evolution—a live* cell in the tree of justice. * * * Corbin, THE LAWS OF THE SEVERAL STATES, 50 Yale L.J. 762, 775-776 (1941)." (Emphasis ours)

The latter panel of this court, composed of Judges Van Oosterhout, Lay and Van Pelt, in their decision filed August 8, 1978, has ruled diametrically opposite to the previous holdings of other panels of this court. In order that the plaintiff-appellee, cross appellant be given a full measure of "his one day in court" he should not be forced to seek a rehearing before an antagonistic panel that has heretofore committed numerous errors of material fact and used inapposite law to deny him vested property rights. All of the courts, who have considered this cause, recognize and hold that the law of Arkansas is applicable. However, the initial panel for the 8th Circuit Court of Appeals (and the trial Judge Paul X. Williams) agree that a cause involving the issues presented in this cause has never been heard or ruled upon by the Supreme Court of Arkansas. The latter panel of this Court of Appeals cites and bases its decision upon a United States District Court case (*National Lead Company v. Magnet Cove Barium Corporation,* 231 F. Supp. 208 (1964)) involving minerals of a substantial different quality of and physical characteristics, and inapposite jurisprudence, viz. solids versus liquids.

In addition, the latter panel of the court has held that the retroactive application of an Arkansas Statute (Section 52, .201 as amended) changes the subject matter of this case from a trespass involving bromine, sulphur and other valuable minerals to a trespass involving saltwater; this holding was error, despite the fact no saltwater has been consumed or sold by the trespassers

and all saltwater has been returned to the reservoir from which it came by these trespasser-defendants. At the same time these same trespassers have sold large quantities of bromine extracted from the produced brine, and realized a huge profit from their trespass.

The initial panel of this court held that:

> "Accordingly, *the appellant has a vested existing property right in the brominated saltwater* underlying his land, and the action of the defendants in forcibly removing that solution by means of injection and production wells on surrounding property constitutes an actionable trespass." (Emphasis ours)

Therefore, the initial panel of this court clearly aligns the parties in this case in a trespasser-victim category. The latter panel has completely negated the previous panel, by holding that the plaintiff was entitled to a mere royalty on saltwater. At the same time the latter panel has permitted the defendants-trespassers to confiscate the valuable minerals contained in this saltwater and reap an exorbitant profit at the expense of the victim of its wrong doing. To permit a trespasser, whether intentional or in good faith, to enjoy a profit from his wrong doing violates common sense, judicial reasoning, prior decisions of this 8th Circuit Court of Appeals and every percept of law including the Constitution of the United States.

An unusual event occurred during the oral argument in which Defendant's attorney asked the panel if the clerk had distributed some document or paper to the panel, and said attorney proceeded to read from this ex parte latent filing. Plaintiff's attorneys were not advised of this before or at the hearing.

THEREFORE, Plaintiff-Appellee, Cross-Appellant suggests an en banc hearing so the entire membership can protect the

rights set out in *Young v. Ethyl, et al.* (supra) and to determine the correct facts of the case and laws applicable thereto.

Respectfully submitted,

ROBERT J. MOFFATT
800 Beck Building
Shreveport, Louisiana 71101

CHAMBERS & CHAMBERS
P. O. Box 157
Magnolia, Arkansas 71753

/s/ MELVIN T. CHAMBERS
Attorneys for Plaintiff-Appellee,
Cross Appellant

Certificate of Delivery

Two copies of the within petition were personally delivered to Paul C. Crumpler, attorney for Ethyl Corporation, on this 30th day of August, 1978.

/s/ MELVIN T. CHAMBERS

APPENDIX F

(Order Denying Petition for Rehearing)

United States Court of Appeals
For the Eighth Circuit

77-1807 September Term, 1977

J. M. Young, Appellee,

vs.

Ethyl Corporation, Appellant.

77-1829

J. M. Young, Appellant,

vs.

Ethyl Corporation, et al., Appellees.

Appeals from the United States District Court for the Western District of Arkansas

The Court having considered petition for rehearing en banc filed by counsel for appellee-cross appellant, J. M. Young and being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

September 8, 1978

APPENDIX G

(Order Denying Motion to Recall Mandate)

(Filed October 11, 1978)

United States Court of Appeals
For the Eighth Circuit

No. 77-1807 September Term, 1978

J. M. Young, Appellee,

vs.

Ethyl Corporation, Appellant.

No. 77-1829

J. M. Young, Appellant,

vs.

Ethyl Corporation, Great Lakes Chemical Corporation, Calvert Exploration Company, and Bromet Company, Appellees.

Appeals from the United States District Court for Western District of Arkansas.

On consideration of motion of appellee/appellant, Young. to recall mandate in these causes, it is now here ordered by this Court that this motion is hereby denied.

October 11, 1978

APPENDIX H

(Clerk's Certificate)

United States Court of Appeals
For the Eighth Circuit

I, Robert C. Tucker, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing eight volumes contain a certified transcript of record for use in the Supreme Court of the United States on application for writ of certiorari consisting of volume of filings designated by appellee/cross-appellant; six volumes of Appendices and volume of the Proceedings in the Court of Appeals containing Opinion and Judgments entered thereon on August 8, 1978; Petition for Rehearing; Suggestion for Rehearing En Banc; Order denying Petition for Rehearing En Banc and for Rehearing and Order denying motion to recall Mandate in the cases of J.M. Young, Appellee/Cross-Appellant v. Ethyl Corporation, et al., Appellant/Cross-Appellee, Nos. 77-1807/1829, as full, true and complete as the originals thereof remain on file and of record in my said office.

And I do further certify that the Mandate of said Court of Appeals in these causes were issued and sent to the Clerk of the United States District Court for the Western District of Arkansas on the 19th day of September, 1978.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit at office in the City of St. Louis, Missouri this 11th day of October, 1978.

ROBERT C. TUCKER
Clerk of the United States Court of
Appeals for the Eighth Circuit

(Seal)

[694] APPENDIX I

(Excerpt from App. Vol. I of case nos. 77-1807/1829)

Mr. Malik: We will do that.

The Court: Exchange a list showing name, address, general nature of the testimony this witness is expected to use in the trial, and I see no reason you cannot go right ahead with your schedules for depositions and have this fully developed. Of course, Mr. Chambers, you understand you have the burden of proof to prove how much damage you have.

Mr. Chambers: How is that?

The Court: You have the burden of proof so the burden on discovery ordinarily goes along with the plaintiff first.

Mr. Chambers: I was under this impression; our trespass was established and the burden shifts to the defendant.

The Court: On value?

Mr. Chambers: On everything.

[695] The Court: At the risk of displaying complete lack of erudition this Court would rule you would have the burden of proof to show how much you are harmed. You would have the right to open and close just like in any other trial. The only thing this would be before the Court without a jury.

Mr. Chambers: This statement from 89 Corpus Juris Secundum, page 678, Notes 65, 66, 67 and 68 reads—

> "The burden of showing the true value of the property shifts to defendant where, by his wrongful conversion, he has put it beyond the power of plaintiff to prove such value. If Defendant claims a reduction of the damages by reason of the fact that he has enhanced the value of the article innocently converted, the burden is on him to show the facts necessary to the establishment of this defense,

including proof as to the value that has been added to the property. If he claims a reduction of damages by reason of his good faith in committing the conversion he has the burden of proving his good faith".

[696] The Court: I would be glad to hear you on that. Are you going to produce your witnesses who will say my in place value was and try to anticipate——

Mr. Malik: I would just reply to his argument that if we have got the burden of proof why do we have to produce income taxes, tax returns and all of this for him.

The Court: I am ruling the other way. I recognize that Corpus Juris is a real thick book and I hate to be hit with it but the burden of proof will be on Mr. Chambers in this case.

Mr. Chambers: We will try to do that but we want to save our exceptions to the ruling. Also if it is proper at this time I would like to save exceptions to the over ruling or dismissal of the Motion for Judgment on the Evidence.

The Court: Your exceptions are hereby noted and I will be glad to—well, in this case I would be glad to certify for you any question that may need to be taken back to the Eighth Circuit to give us directions on how to try this case.

APPENDIX J

(Excerpt from App. Vol. II of case no. 74-1775)

[473] **H. B. BEESON,**
called as a witness on behalf of the plaintiff, in rebuttal, having been previously duly sworn, testified further as follows:

Direct Examination

BY MR. MELVIN CHAMBERS:

Q. Mr. Beeson, you've already testified in this matter, and you are called for the purpose of explaining the operations of your gathering system. And, if I have it right,——

Mr. Melvin Chambers: Will it be all right to ask leading questions in this?

Mr. Malinak: Sure.

Q. ——you have submerged pumps in your producing wells, haven't you?

A. Yes.

Q. And those submerged pumps are the pumps that pump the bromide bearing brine out of the wells, aren't they?

A. Yes.

Q. Those pumps are attached to pipelines that you and Mr. Madden have approved?

A. Yes.

Q. Are all of those lines going separately to the plant from each well or do they join along the way at places to larger lines?

[474] A. They join to larger collecting lines.

Q. They join to larger collecting lines, and are those collecting lines close to some of the wells and further from some of the others?

A. Correct.

Q. And as they are collecting into the collecting line where you have your general lines bringing your bromides to the plant, aren't all of the fluids staying in a pipe from the pump until get to the plant?

A. Well, the answer is obviously they don't stay on one pipe until they get to the plant, they go into a collecting system.

Q. That's what I mean, they're in pipes collecting from the pump to the plant? They're not exposed to the surface anywhere?

A. The pipes that are connected to the pumps go individually to a collecting—what we call a collecting header, if you will, a large collecting system, and those brines so introduced into the system are then pumped by the same pressure introduced by the well pumps into the plant.

Q. In the plant. So it commingles part of the time on the way to the plant and at the plant it all is commingled, isn't it?

A. The commingling takes place in the pipelines themselves. **[475]** There is no process of agitation at the plant that would further commingle these nor do I think that it's necessary. They are commingled, if you will.

Q. They are commingled. And then you extract the bromides there and put them back in a distribution system to pump it back—pump the tail brine or the waste material back into the injection wells?

A. Well, it's rather academic, but there is the introduction of one more little process situation and that is that on the header going to the plant there is a connection to a pond and this pond is a reservoir, if you will, in which any other-production from the brine plant might be held in reserve or from which a lesser production from the brine wells could be made

up. So, there is a bubble on the line, if you will, in the form of a pond. But, with that one stipulation, they go in the plant.

Q. They all go in the plant together. And it's not distinguishable, then, any brine-bromide producing brine is not distinguishable from any other area or well by the time it gets there, is it?

A. From our wells, we would not be able to distinguish it.

Mr. Melvin Chambers: That's all.

Mr. Malinak: I just have two questions, sir.

APPENDIX K

(Excerpt from App. Vol. II of Case No. 74-1775)

[307] Beeson-Direct

. . . Joe did indeed spearhead our leasing program here.

Q. All right. Did—before you commenced your leasing, did you endeavor to determine where—well, let me back up, first. Is it practical to operate a brine field without a plant to extract the bromine from the brine that you produce?

A. Obviously, it's not. This has to be viewed as a closed-circuit operation. There is involved, fundamentally, in the operation producing wells, collection lines to move the brine into a plant where the bromine is extracted, and then the brines are reinjected. It's obviously different from the oil and gas industry or the oil industry where oil is produced to the surface and has a market at that plant. Without the plant, there wasn't a market.

Q. All right. So, without the brine field, there was——

A. There wasn't a plant.

Q. ——there wasn't a plant, and without a plant, the brine field is useless?

A. That's correct, these two are hand in hand and are inseparable.

Q. All right. Did you undertake, before you started your leasing program, to try to locate a good plant site and acquire one?

A. Yes, we looked at a number of plant sites. Obviously, the

* * * * * * *

APPENDIX L

(Excerpt from App. Vol. I of Case No. 74-1775)

[139] Madden—Direct

. . . be producing bromides from under Mr. Young's land, didn't you?" And did you not answer: "I would think that was possible, yes, sir."

A. You're asking me do I think it's possible the way of this operation that the brine would move from 13 over to 18 and 23, I say yes, sir, that is right.

Q. And that would have been a logical conclusion to have drawn from the pattern of the wells, wouldn't it?

A. That would be.

Q. Then I would want to ask you something about the—when you were locating your plant there, when you were drilling the wells, you knew there was no value or no market for brine or salt water or brine or salt water with bromides in it, didn't you?

A. There was no market in the usual commercial sense for it, no.

Q. Yes, sir. So, then, the only market that it would have had was the finished product that you finished at your plant after you got through manufacturing? You first extract it from the water, don't you?

A. That is right.

Q. Then you manufacture it into a product, don't you?

A. Right.

Q. And up until then it had no market value whatsoever, did it?

[140] A. No, you can't—it's pretty hard to sell salt water.

(Whereupon, Mr. Melvin Chambers confers with Mr. Moffatt.)

Q. You said that Bromet and Ethyl owned the leases down there. Did you not know that all of the time there that they did not own a lease on Mr. Young's land?

A. That is right.

Q. Now, when you drilled 18-A, Hunter Company— I believe that was in October, '69, you began that operation, wasn't it?

A. I couldn't name the month that we started that. That would be probably about the right time.

Q. Yes, sir. And Hunter Company and you folks—when I say "you folks" I mean Ethyl and Calvert and whoever is involved—got together and drilled 18-A down to the Cotton Valley, didn't you?

A. We did.

Q. And Hunter Company paid part of that operation, didn't they?

A. That is right.

Q. And after you got down into the Cotton Valley, it was not what you expected it to be in gas production, was it?

A. No, huh-uh, it was a very good gas well.

Q. Then——

APPENDIX M

(Excerpt from App. Vol. I of 74-1775)

[119] **Jameson—Redirect**

. . . Attorneys at Law, Oil & Gas Building, Magnolia, Arkansas, September the 26th, 1972.

"Mr. Joe D. Woodward
Woodward and Kinard
Attorneys at Law
P. O. Box 727
Magnolia, Arkansas 71753

"Dear Joe:

"Your letter of September 11, 1972, addressed to Mr. Robert Raborn with regard to the Jameson property has been handed to me for reply. Your offer on behalf of Mr. Jameson to participate in the operations of Bromet is not acceptable. We regret that we have been unable to complete negotiations in a manner that is satisfactory with Mr. Jameson.

"We, of course, are still willing to purchase a lease from the Jamesons. If the Jamesons would like to reconsider our prior offer to them, please advise; and I will have one of our agents contact either you or Mr. Jameson personally.

"Yours very truly,

Signed "Paul"
"P. C. Crumpler

For:

Anderson & Crumpler"

APPENDIX N

(Excerpt from App. Vol. I of case No. 74-1775)

[103] **Jameson—Direct**

. . . plant was over with. So, you know, I had no worries there, if the technology was that good.

And I kinda lost my track but——

Q. You want to get down to the offer of participation.

A. Okay. Now, I finally got down to the point where assuming that the $10.00 was fair, I said to Ambrose—I called him up on the telephone—or I wrote him a letter, I believe, though I can't find a copy—but, anyway, I talked to Ambrose, and I said, "I'll tell you what, if you will insert one sentence in there"—well, plus one other clause which they had agreed to put in there—"If you will insert one other sentence, then we'll sign the lease." And that sentence was: "This instrument is an attempt on both parties to deal fairly and honestly with each other." He said they could not accept that sentence, so I said, "Okay, thank you, we will not lease."

Now, shortly after that, or sometime after that, Bromet sent out letters saying that Mr. Raborn, in the Ethyl Tower in Baton Rouge, Louisiana, would be in charge of the plant operations. That letter went out about March of '71. In April of '71 I was in his office in Baton Rouge, again at my expense, and I had a conference with him to see if I could work out the 95 acres, and I stated to him, more or less, that I felt like that they were **[104]** in fact operating a unitized field, that they had not leased our land, we had not been able to negotiate a satisfactory lease to both parties, and, therefore, I was, or my mother, was—had an unleased acreage, and, therefore, we were part of the unit and we should pay our pro rata share of the cost of the operation or the cost of drilling, you know, of the whole kit and caboodle and share in the profits.

Now, I'm trying to go back and remember a couple of years and my memory—sometimes I can't remember what happened yesterday—Mr. Raborn—and I told him that was my first choice, but if we could not do that, maybe we could work out something else. He wrote me a letter, and without stating anything—at the time of the conversation he felt—he said to me, more or less, that he felt sure his management would not go with such a deal.

Q. That is participation?

A. Participation type of operation, but that he would check. He did tell me he would check, but that he was sure that they would not do it. I subsequently got a letter from him, oh, a couple of months later, a month later, something or other, and he indicated that he could accept one clause that I had said should be put in the leases. And I said, "If we can't go to participation **[105]** factor, then I think that I would want in the lease some clause which we could try to work out the language in which if technology increased the value of whatever they were producing, we wanted to be a royalty participation." He indicated in his letter that this would not be acceptable to them, that they would only go with the same lease that they leased everybody else and that they were willing to lease the land.

Subsequent to that, I had the firm of Woodward & Kinard, Joe Woodward, write a letter to Mr. Raborn, and this probably occurred this year, but I don't know, again I'm not sure of the dates. Mr. Woodward wrote a letter to Mr. Raborn stating that my mother wished to pay her pro rata share and participate in the proceeds.

Q. Do you have a copy of that letter?

A. Yes. Yes, I have a copy of that letter.

Q. Do you have it with you?

A. I have—now, the original would be at Baton Rouge or wherever they keep their records, and I only have one photo-

copy, so if you're going to have to introduce that in the record, I want some way to get it back or to get a photocopy of it.

Q. We will introduce it and ask to substitute a copy for that and let you have it back, then.

A. All right, I'm willing for it to be in evidence, but I

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APPENDIX O

(Excerpt from App. Vol. II of case No. 74-1775)

[377] **Beeson—Redirect**

Your Honor, if the Court please.

Redirect Examination

BY MR. MALINAK:

Q. Mr. Beeson, by the time that you completed the construction of the plant, was your lease block substantially completed in the form that it is now?

A. No.

Q. Were there some leases executed by that time?

A. Yes.

Q. All right. And were they all the same leases of the character that's identified as Plaintiff's Exhibit 2 that you saw previously?

A. I had indicated in an answer to a previous question that there were—there was one difference that has been made in some of our leases, so that basically we have that lease with one provision added on some leases.

Q. All right. Did all of the leases that were executed by the time the plant was commenced contain this language in here about the "right to produce or remove salt water and its contents by drilling, pumping, drainage, injection, forced subterranean movement or by other means"?

A. Yes.

Q. Did it have the royalty or bonus in lieu of royalty **[378]** provision in there——

A. Yes.

Q. ——for salt water?

A. Yes.

Mr. Melvin Chambers: I think we are going back, the instrument speaks for itself.

The Court: He answered that it did.

Q. So by the time that the plant commenced, Mr. Young or anybody else could have asked one of his neighbors what was in the lease, if he didn't already know, and find out, could he not?

A. Yes. I do submit that Mr. Young had seen our lease by virtue of the fact that we had offered a lease to Mrs. Young and discussed the possibility of leasing Mrs. Young's property on several occasions in the presence of Mr. Young.

Q. All right.

A. So he had—certainly was very familiar with our lease.

Q. Now, referring to Exhibit No. 1, before—excuse me, I believe that's a different exhibit there—this one right here. Referring to Exhibit No.—Plaintiff's Exhibit No. 12, which is the flow pattern the plaintiff has introduced, if before you drilled wells No. 18 and 23 Mr. Young had, or his lessee, Hunter Company, had drilled wells on the places marked "X" on that exhibit, would

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APPENDIX P

(Excerpt from App. Vol. I of case no. 74-1775)

[70] Young—Direct

. . . three times twice a day, trying to buy it. I told him I didn't want to sell, I was satisfied, it was home. And he kept on, oh, for a month, I guess. Finally sent Mr. Muncy out there. He came three trips. Mr. Muncy was very nice, very courteous. He approached me and told me they sent him out there to buy my farm. I informed Mr. Muncy I didn't want to sell. Well, we visited awhile and he went on. I think he came three times. Then Mr. Kelley came sometime the first of December, and he told me, he says, "I came out here to buy your farm." I told him, Mr. Kelley, I didn't want to sell, and Mr. Kelley came back there for, oh, every day or two, I say three or four times a week, trying to buy me out, and I would tell him every time I didn't want to sell, I was satisfied. Finally, I asked him one day, I said, "What do you want with my land?" "They sent me out, they've got a project." I said, "Who are 'they'?" I found out he was working for Mr. Ambrose, he told me. Well, I didn't hear anything more until about the 1st of January, and, oh, about the 15th or 20th of January they told me that they were leasing land around me. So they had never approached me, every time they wanted to buy, and I would tell them I didn't want to sell, it was home to me. He asked me—I think he said "How long have you been here?" I told him I built a home and moved out **[71]** there in '33, 1933, and after I—Mr. Yelvington leased my land to Byron H. Schaff, Shreveport, oil and gas lease. He inserted at the bottom of it there a clause "including salt water and mineral out of the salt water". He came to my house, Mr. Yelvington did, along with Mr. Schaff one night, they was in Magnolia, and they asked if I would read the lease. They said, "What do you

know about that?" I told them I didn't know anything about this, but "I'll sign your oil and gas lease because I presume it's all right", and I signed the lease on the 12th of January. They never had approached me about a lease.

Q. This is, the defendants had not?

A. No.

Q. Okay, go ahead.

A. Along in February, Mr. Kelley came rushing down late one afternoon and wanted to lease my land. I had never seen one of the leases, so he left one of the leases with me. I told him he was too late, I had done leased it to Mr. Schaff, and—but he left me a lease, told me to study it. I did, and I decided I didn't like the lease and its contents, it gave them all of the advantages at my disadvantage.

Q. It what? A. It gave them all the advantage at my disadvantage. I [72] believe Article 1, all it offered was oil and gas lease. Article 2 says you can release any part or all parts any time——

Mr. Malinak: Excuse me. Your Honor, the lease speaks for itself, and that ought to be in evidence rather than some characterization of the witness about what the lease says.

Mr. Melvin Chambers: I think, Your Honor,——

The Court: That's true.

Mr. Melvin Chambers: ——he can tell why he didn't like the lease.

The Court: Well, you can use the lease, if you want to, if he's going to testify to it, as to what its contents is.

Mr. Melvin Chambers: Yes, sir. Will it be all right for him to go ahead and teli what the clauses was he didn't like?

The Court: No, counsel for the defendants have objected to his testimony in referring to what is in the lease on the basis that the lease would be the best evidence, which is true.

Mr. Melvin Chambers: That is right, but he was not talking about what—contrary to the lease or anything, disputing the lease, he's just telling what [73] part of the lease he didn't like about the lease.

The Court: Mr. Chambers, we told you that he was attempting to quote what was in the lease. Now, you can produce the lease and let him talk about it if you want to, but the objection is sustained.

Q. Do you have a copy of the lease, Mr. Young?

A. No, I haven't, not with me.

Q. What part of the lease is it here that you have reference to, Mr.——

Mr. Malinak: Your Honor, again, may I suggest that the lease be identified and marked and offered into evidence before we start testifying to it.

The Court: You gentlemen stipulate this is the lease referred to?

Mr. Malinak: Yes, sir.

The Court: Any objection to it being included?

Mr. Melvin Chambers: No, sir.

The Court: Let it be received as Exhibit 2.

(Whereupon, a document is marked as Plaintiff's Exhibit No. 2 by the Clerk.)

A. This section right here.

Q. Article 2?

A. Uh-huh.

Q. Refers to Article 3. Now, what part of it in there are [74] you opposed to?

A. The part that says that sub-section (e) of Article 3 that you multiply one by ten and that's your payment. That reference was made, I think, seven times in the rest of the lease.

Q. Now, the last paragraph of Article 3 that refers that they can release any part or all of the lease, was that acceptable or not?

A. No.

Q. All right. Where it also said "forced subterranean movement" in Artcle 1, was that acceptable?

A. No.

Q. Was offer made to you, or did you discuss with them about reserving the minerals when they were trying to buy your land?

A. Yes, I told them that if I should happen to sell, I would reserve half of my minerals. I was informed no, they wanted me to move. Then I told them I got there first.

Mr. Melvin Chambers: You all object to the introduction of two releases he received? These are the original releases, and I would like to introduce them and withdraw them and substitute copies in their place.

(Whereupon, two documents are shown to counsel for the defendants.)

[75] (Whereupon, Mr. Melvin Chambers confers with Mr. Rodney Chambers.)

Mr. Crumpler: No objection.

Mr. Melvin Chambers: I want to introduce those,——

(Whereupon, two documents are marked as Plaintiff's Exhibits Nos. 3 and 4 by the Clerk.)

Mr. Melvin Chambers: ——and like to substitute copies in lieu of them and have the originals back sometime.

The Court: Let them be received, and you may substitute copies.

(Whereupon, Mr. Melvin Chambers confers with Mr. Moffatt.)

Q. Mr. Young, you said '64 when they first came—November, I mean. Did you mean November what year?

A. 1964.

Q. And then did they at any time even after they were operating in there with a plant inform you as to what the plans were in the operational unit?

A. The first I knew of what it was going to be was the County Judge came down and was going to survey and renew the road and I was giving some more land to build the road. Mr. Head was cleaning off the ground, and I asked him what was going up there, and he said, "A bromine plant", and I asked him would they take care of the **[76]** vapors, and he said, "You'll never know it's there".

Q. Did ever anything else come up that they told you anything about the operation? Did you ever discuss anything about any of the other operations? Did they ever reveal to you how they were going to operate the field?

A. No.

Q. The wells?

A. No. No, sir.

Q. Did you ever get an opportunity to talk with them about it?

A. The men that dug the wells, Mr. Jack Lecone, Mr. John Morris, they were the superintendents, the ones that dug the wells around me, they came to my house one afternoon, both of them, and they was in search for a place to get some water to run—for the rigs. We went down and they picked out a place. So they got water there for eight wells. They would very often visit me there. Go up there, you know, when they have to go down to the wells to pump the water. And them two superintendents, drilling superintendents, told me they was going to make brine wells.

Q. Going to make brine wells?

A. Yes, sir, told me that.

Q. Do you know when that was?

[77] A. That was in '68, the latter part of '68.

Q. '68.

A. (Nods head affirmatively)

Q. And did you find out then how they were going to operate the wells, where they would be located, which kind, whether they would be injection wells or output wells?

A. I didn't ask any questions and didn't anybody tell me. I was a farmer there and I tended my own—what little business I had, most of it was just work.

Q. Did they ever ask you—explain anything to you and ask you to participate with them?

A. No, sir.

Q. Did they ever offer you a royalty under—the consideration royalty being a proportionate part or part of the production?

A. No, sir.

Q. And did you learn anything about the value of the products or anything?

A. No, sir.

Mr. Melvin Chambers: I believe—just a minute.

(Whereupon, Mr. Melvin Chambers confers with Mr. Rodney Chambers.)

Q. You said you got your lease back, I believe it was in December of '69 you got release on that lease you gave. Subsequent to that time had you come to see me and asked [78] me about seeing if I could get you participation in that plant?

A. I think 1970 I asked you to investigate, write to them.

Q. And did you get an acceptance or refusal?

A. I believe I got a lease form filled out and they wanted me to sign that.

Q. Was in the same type lease that has been exhibited here?

A. Yeah, and once I think me and Mr. Anderson and Mr. McGrew and Mr. Raven all met down in your office to see if we could work out some workable plan. Mr. Anderson informed me that I had to take just what the rest of them did, or he says "You have got to take that". When he got through, I told him, "Mr. Anderson, I got no criticism to offer on anybody else, what they did," I said, "but mine, I want a fair contract". I believe you will verify that.

Q. Yes, sir.

Mr. Melvin Chambers: Tender the witness.

Cross-Examination

BY MR. MALINAK:

Q. Mr. Young, I believe you indicated that you have lived on the land, or up until recently lived on the land that's marked in yellow on Exhibit 1 since 1933?

APPENDIX Q

(Excerpt From Defendant's Exhibit 12)

[10] . . . lessee under an oil and gas lease. Brown, *The Law of Oil and Gas Leases*, § 3.02, p. 26.

> "Our court has held that an oil and gas lease conveys an interest and easement in land itself, but no title passes until the oil and gas is reduced to possession." *Pasteur v. Niswanger*, 290 S.W.2d 852 (Ark.Sup.Ct., 1956).

For our present purposes, however, this distinction appears to have little or no effect in that the rule of capture appears to be equally applicable under the incorporeal hereditament and ownership in place theories. *Brown, supra*, § 3.03, p. 30; 13 Tex.L.Rev. 391 at 419.

CONCLUSIONS

Applying the authorities to the activities proposed in this instance, the following preliminary conclusions seem warranted:

1. In the absence of the severance of the mineral and surface estate, the landowner would apparently be entitled to grant by lease or deed the right to produce subsurface salt water.

2. The rule of capture applies to the production of subsurface salt water. If we may assume that the subsurface salt water in our case is in natural suspension and not in a salt dome as a hard mineral, and that the subsurface water in which the salt is suspended is not a defined and charted underground stream, the rule of capture **[11]** would allow the production of unlimited, or at least *nonwasteful*, quantities of salt water by the leasing of only one tract without liability to the owners of surrounding tracts for drainage.

3. If the surface and mineral estates have been severed by lease or deed, the controlling factor will be the language and construction of the instrument effecting such conveyance. Clearly salt water is a mineral in the technical sense. Whether it is to be classed as a mineral in any particular instrument will depend on the intention of the parties. The cited authorities, as well as logic, clearly distinguish the nature of fresh water and salt water. The fact that salt water was not considered a valuable mineral substance at the time of the conveyance would undoubtedly be important. Whether or not drilling to such a depth would constitute a breach of a possible grant of exclusive exploratory rights should be considered if applicable.

4. The commercial production of extracted chlorides from subsurface salt water, as is proposed, under lease from the landowner, is legally feasible and is in fact being accomplished at present.

APPENDIX R

(Opinion of Judge Harris—District Court)

J. M. YOUNG,

Plaintiff,

v

ETHYL CORPORATION et al.,

Defendants.

No. ED 72-C-6

United States District Court
W.D. Arkansas
El Dorado Division

Sept. 20, 1974

Landowner brought diversity action to enjoin operation of bromine plant located immediately South of landowner's property and for an accounting for purpose of claiming compensation for sale of products taken from landowner's property in connection with operation of the plant. The District Court, Oren Harris, J., held that substantive law of Arkansas, where property was located was applicable, and that, under Arkansas law, operators' injection into brine field of debrominated waters which displaced brine waters in formation underlying landowner's property, thus forcing brine waters to move forward and eventually produce through operator's wells located on property adjacent to landowner's property, did not infringe upon any legally protected property right of landowner.

Judgment for defendants.

1. Courts Key 359.1(12)

In diversity action instituted by landowner to enjoin operation of bromine plant on land adjacent to landowner's property and for an accounting for the purpose of claiming compensation for sale of products taken from landowner's property in connection with operation of the plant, substantive law of Arkansas, where property was located, was applicable. 28 U.S.C.A. § 1652.

2. Mines and Minerals Key 81

Under Arkansas law, conduct of operators of bromine plant in injecting debrominated waters under high pressure into brine field thereby displacing brine waters in formation underlying landowner's property and forcing such brine waters to move toward and eventually produce through operator's wells on property adjacent to landowner's property did not infringe upon any legally protected property right of landowner. 28 U.S.C.A. § 1652.

Anderson & Crumpler, Magnolia, Ark., and Baker & Botts, Houston, Tex., for defendants.

Chambers & Chambers, Magnolia, Ark., for plaintiff.

Memorandum Opinion

OREN HARRIS, District Judge.

The plaintiff, J. M. Young, brings this diversity action against the defendant, Ethyl Corporation, Great Lakes Chemical Corporation, Calvert Exploration Company, and Bromet Company, seeking an injunction against the defendant from continuing operation of a bromine plant located immediately South of the plaintiff's land in Columbia County, Arkansas.

In addition to injunctive relief, the plaintiff seeks an accounting of the gross proceeds of the defendants' plant or the gross sales of all products for the purpose of claiming the proportionate part of the products or sales therefrom taken from his lands as bears to the whole of the products going into the plant. The plaintiff claims that the defendants, by way of trespass upon his property, are depriving him of just compensation to which he is entitled from the sale of products being taken from his lands in connection with the operation of the defendants' plant in utilizing the product from within and under plaintiff's lands.

In addition to injunctive relief and an accounting, the plaintiff seeks an opportunity to establish damages to his property in a substantial amount from the defendants' recycling operation in connection with the bromide plant.

The plaintiff is a resident and citizen of Columbia County, Arkansas.

The defendant, Ethyl Corporation, is a Virginia corporation authorized to do business in the State of Arkansas.

The defendant, Great Lakes Chemical Corporation, is a Michigan corporation authorized to do business in the State of Arkansas.

The defendant, Calvert Exploration Company, is a Delaware corporation authorized to do business in the State of Arkansas.

The defendant, Bromet Company, is a limited partnership with Ethyl Corporation as the sole general partner and Great Lakes Chemical Corporation as the sole limited partner. Bromet became a limited partnership under the laws of the State of Virginia and is authorized to do business in Columbia County, Arkansas.

The plaintiff is the owner of approximately 180 acres of land, more or less, in Sections 7, 8 and 18, of Township 18

South, Range 20 West, within the County, which is the subject of the plaintiff's Complaint and relief sought against the defendants.

The defendants, in combination, pursuant to contracts have leased a substantial block of lands consisting of approximately 16,000-acres for the purpose of extraction of brine from the Smackover Limestone Formation beneath the lands which is delivered to a recycling plant operated by Bromet. Bromet extracts bromine from the brine and sulphur from the hydrogen sulfide gas released by the brine delivered to its plant. The defendant, Calvert Exploration Company, under contract, delivers the product to the plant and, after the extraction, re-injects the debrominated water into the ground, thus forming a complete re-cycling operation.

Calvert had the responsibility of drilling the wells under contract with Ethyl. There were 23 such brine supply wells strategically placed within the leased area to supply the product for the extraction plant and 10 injection wells located on the perimeter of the leased lands for a continuing operation for production of bromine.[1]

The plaintiff's lands are located in the Southwest area of the leased block. The defendants' production well number 23 is located immediately to the North and West of the plaintiff's lands. The defendants' production wells numbered 18 and 18-A are adjacent to the North and East of the plaintiff's lands.[2]

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[1] Bromine is an element, normally a deep red, caustic liquid emitting an irritating, reddish-brown, ill-smelling vapor used, inter alia, for manufacture of ethylene dibromide, a gasoline additive chemical.

[2] Prior to the drilling of well number 18, plaintiff, J. M. Young, and his wife, Sally Young, had executed an Oil, Gas & Mineral Lease to Bryon H. Schaaf of Shreveport, Louisiana, which leases, at the time of drilling, were owned by T. V. Hunter Company. The mineral leases contained a special provision for the conveyance of salt water or any mineral contained in salt water. Hunter and Calvert jointly

In obtaining the numerous leases that make up the block in the recycling operation, Bromet attempted to purchase a lease from the plaintiff for the same consideration as was paid to all other mineral owners in the block at $25.00 an acre and, in addition, $10.00 per acre per year on an annual basis. The plaintiff declined the offer and eventually brought his proceedings against the defendants.

The amount in controversy exceeds $10,000.00, exclusive of interest and costs. Jurisdiction is therefore established. 28 U.S.C.A. § 1332.

The case was tried to the Court, without the intercession of a jury. It was commenced on Monday, October 29, 1973. Since the hearing was not concluded, it was adjourned and resumed November 1, 1973, and concluded November 2, 1973.

In addition to the testimony presented during the course of the hearings, depositions were entered, as were numerous exhibits. The parties were given substantial time to file briefs and responses thereto.

From the evidence in the case, exhibits, excellent briefs filed by counsel for the parties, and the entire record, the Court concludes that the plaintiff is the owner of approximately 180 acres of land situated in Columbia County, Arkansas. The defendants are the owners and operators of a bromine chemical plant in Columbia County, Arkansas, located adjacent to the plaintiff's lands.

It is established that the defendants have acquired and possess mineral leases consisting of a block of land of some 16,000

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drilled an oil and gas well to the Cotton Valley Formation, which was a non-productive well. Subsequently, Calvert continued to drill the same well to the Smackover Limestone Formation. Well 18-A was operated as a brine supply well but, due to the limitation in relation to the other supply wells, No. 18 was drilled near to it to provide the production required in relationship to the entire cycling process.

acres, commonly known as "Kerlin Brine Field", upon which the defendants have caused to be drilled 23 wells for the extraction of bromine from the Smackover Lime Formation underlying these lands at a depth of some 8200′ below the surface.

The defendants also drilled and operate 10 wells through which the salt water, after being processed through the bromine plant, and bromine extracted, is re-injected into the same formation under pressure. The injection wells generally form what, in fact, is a circle on the periphery of the brine field with the production wells operating within the circle. The debrominated water, injected under pressure, forces the underground salt water in place to move in the direction of the production wells, completing the recycling process for the extraction of bromine.

The plaintiff's lands are surrounded by the lands leased and purchased in fee by defendants within the Southwest area of the Kerlin Brine Field. An injection well, number 13, is located adjacent to and South of the plaintiff's lands, which, as shown by a preponderance of the evidence, forces the product to production wells numbered 18 and 23.

It is established, and undisputed, that the injection of debrominated waters from the defendants' plant through well numbered 13, under high pressure, displaces the brine waters in the formation underlying the plaintiff's lands, forcing it to move toward, and eventually produce through wells numbered 18 and 23. The salt water, by means of this artificially induced movement beneath the lands of Mr. Young, is carred to the processing plant where the valuable mineral bromine is removed and sold for the purposes hereinabove described. This recycling process has continued since the inception of the production and processing in 1969.

Although the defendants attempted to acquire a salt water lease from the plaintiff without success, the plaintiff, on August 21, 1970, made a demand of the defendants to account to him

for his proportionate part of the net profits from the production of the salt water and the operation of the bromine plant on the basis that they were removing and extracting the product from beneath Mr. Young's lands. Defendants refused, but again attempted to purchase a lease from the plaintiff Young and he, again, refused to sell. During the course of the hearing, the defendants again stated that they would enter into the lease agreement with the plaintiff and pay the bonus price of $25.00 per acre and $10.00 per acre in lieu of royalty payments on a retroactive basis.

In seeking an accounting from the defendants, to establish his proportionate share of the net profits from the operation of the recycling plant, the plaintiff contends that he probably has been damaged in the sum of $9,000,000.00. The plaintiff has not, at any time, offered to share in the expenses or risks of the venture. One of the witnesses, Mr. Jameson, made an offer to participate in the expenses in return for a share of the profits after the venture proved to be profitable. The offer was rejected by the defendants.

[1] Jurisdiction having been established by diversity, the substantive law of the State of Arkansas, as expressed by the State's highest court, is applicable. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); Midstates Oil Corp. v. Waller, 207 F.2d 127, 130, 131 (5 C.A.1953); 28 U.S.C.A. § 1652.

In their carefully prepared briefs, reference has been made to numerous cases for jurisdictions outside of the State of Arkansas and principally so by counsel for the plaintiff. Although, the Court is impressed by the reasoning of counsel for the plaintiff, by a careful review of the cases relied upon, it would be contrary to long and well established rule to apply any rule of law other than the rule established by the Supreme Court of Arkansas.

[2] In applying the facts, as established in the instant case by a preponderance of the evidence, to the law as stated by the Arkansas Supreme Court in Osborn v. Ark. Territorial Oil & Gas Co., 103 Ark. 175, 146 S.W. 122 (1912), and which has consistently been determined by the Supreme Court of Arkansas as the Arkansas law, the position of the plaintiff is misplaced and untenable.

The Arkansas Supreme Court only recently reaffirmed the rule in the case of Budd v. Ethyl Corp., et al., 251 Ark. 639, 474 S.W.2d 411 (1971). The facts there were almost identical to the facts in the instant case. It involved the same defendants in their recycling operation in the same field, Kerlin Brine Field.

The plaintiff, Budd, owned 240 acres of land outside, but adjacent to, the boundaries of the defendants' recycling operation and held a small mineral leasehold interest on 40 acres within the boundaries of the field. Budd demanded an accounting for his proportionate share of the profits from the defendants' recycling operation.

The defendants filed a demurrer to the Complaint of Mr. Budd, which was sustained by the Columbia County Chancery Court, Second Division. The Supreme Court of Arkansas, on appeal, stated the question as whether the Complaint stated a cause of action.[3]

Appellant Budd asserted that the recycling operation was actually draining salt water from the 240 acres and that the appellee should be made to account to him for his share of the minerals that were being extracted from the salt water. The Supreme Court of Arkansas stated, inter alia, in response:

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[3] The same counsel, Chambers & Chambers, representing the plaintiff, Young, in the instant case, were counsel for W. J. Budd v. Ethyl Corporation, et al. The same counsel for the defendants in the instant case, Anderson & Crumpler, and Baker & Botts, represented the defendants in the Budd case.

"That argument is refuted by the law of capture, which we hold to be applicable in this situation. That law was stated in our early case of Osborn v. Ark. Territorial Oil & Gas Co., 103 Ark. 175, 146 S.W. 122 (1912): 'Petroleum, gas and oil are substances of a peculiar character. * * * They belong to the owner of land, and are part of it so long as they are part of it or in it or subject to his control; but when they escape and go into other land or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own lands and taps a deposit of oil or gas extending under his neighbor's field, so that it comes into his well, it becomes his property.' Later cases are to the same effect." pp. 640-641, 474 S.W.2d p. 412.

The Court went on to say that it found no authority in the Oil and Gas Commission to order the unitization of salt water operations that have no bearing upon the extraction or conservation of oil or gas.

". . . It follows that the law of capture prevents the appellant from maintaining his first asserted cause of action." p. 641, 474 S.W.2d p. 413.

Further, the appellant Budd demanded an accounting with respect to the 40-acre tract lying inside the appellee's circle of input wells, upon which the appellant (Budd) held an undivided 1/10th leasehold interest. The appellees owned all the rest of the 40-acre tract. The appellant again asserted his right to his proportionate share of the profits accruing from the recycling operation. The Supreme Court of Arkansas stated as to this contention:

"We think the chancellor was right in rejecting that contention. Here the issue turns upon the limited nature of a lessee's property rights, prior to his attainment of production." (Again, relying on Osborn, supra)

* * * * * * *

" 'Our court has held that an oil and gas lease conveys an interest and easement in land itself, but no title passes until the oil and gas are reduced to possession.' "

The Court went on to state that there is no trespass upon a vested existing property right, as is the case when a tenant in common of the mineral ownership drills a producing oil or gas well without the consent of his cotenant.

As the Supreme Court of Arkansas, in the Budd case, *supra*, made a clear, concise and unambiguous determination of the law, as applied to the instant case, this Court cannot re-examine the logic or wisdom of that Court, as urged by the plaintiff. In applying the rule, as clearly stated in the Budd case, this Court is constrained to conclude that the plaintiff has failed in its burden to prove, by a preponderance of the evidence, that the defendants have infringed upon any legally protected property rights of the plaintiff; furthermore, the plaintiff has failed to show any actionable conspiracy to deprive him of such rights. The Court concludes that the Complaint of the plaintiff is without merit and should be dismissed and judgment rendered for the defendants.

Findings of fact and conclusions of law are incorporated in this opinion pursuant to Rule 52 of the Federal Rules of Civil Procedure. An Order will be entered in accordance with this opinion.

APPENDIX S

(Opinion of the Eighth Circuit)

J. M. YOUNG,

Appellant,

v

ETHYL CORPORATION et al.,

Appellees.

No. 74-1775

United States Court of Appeals
Eighth Circuit

Submitted Feb. 14, 1975

Decided July 25, 1975

A landowner brought an action against owners of mineral rights in surrounding lands, seeking an injunction and damages or an accounting for defendants' actions in forcibly removing valuable minerals from beneath plaintiff's land by means of injection and production wells on the surrounding property. The United States District Court for the Western District of Arkansas, 382 F.Supp. 769, Oren Harris, J., dismissed the complaint after a trial on the merits, and the landowner appealed. The Court of Appeals, Heaney, Circuit Judge, held that under Arkansas law, the rule of capture does not apply and defendants' actions in forcibly removing valuable minerals from beneath plaintiff's land constituted an actionable trespass.

Reversed and remanded.

Mines and Minerals Key 51(1)

Under Arkansas law, rule of capture did not apply and actionable trespass occurred when valuable salt water brine underlying plaintiff's land was displaced by debrominated waters injected through neighboring wells and eventually produced through other neighboring wells. Ark.Stats. §§ 53-109(I)(3), 53-110.

Robert J. Moffatt, Shreveport, La., for appellant.

Robert J. Malinak, Houston, Tex., for appellees.

Before HEANEY and WEBSTER, Circuit Judges, and NANGLE, District Judge.

HEANEY, Circuit Judge.

In this diversity action, plaintiff-appellant Young seeks an injunction and damages or an accounting for the defendants' actions in forcibly removing valuable minerals from beneath his land by means of injection and production wells on surrounding property. The District Court dismissed his complaint after a trial on the merits. *Young v. Ethyl Corp.*, 382 F.Supp. 769 (W.D.Ark.1974).

The defendants hold mineral leases on approximately 16,000 acres of land overlying the "Smackover Limestone Formation" in Columbia County, Arkansas. Their salt-water recycling operation brings salt water brine from a depth of 8,000 feet to the surface by means of production wells. Valuable bromine is extracted from the brine, and the debrominated water is then injected back into the ground through injection wells in a process which forces the subterranean brine toward the production wells.

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* JOHN F. NANGLE, District Judge, Eastern District of Missouri, sitting by designation.

Young's land, consisting of approximately 180 acres, is surrounded by land controlled by the defendants. The defendants attempted to acquire a salt water lease from Young, but were rebuffed because Young believed the terms to be onerous. Defendants' production well number 23 is located immediately to the north and west of Young's land, and their production wells numbers 18 and 18A are adjacent to the north and east of his land. Their injection well number 13 is located adjacent to and south of Young's land. The District Court found that

> It is established, and undisputed, that the injection of debrominated waters from the defendants' plant through well numbered 13, under high pressure, displaces the brine waters in the formation underlying the plaintiff's lands, forcing it to move toward, and eventually produce through wells numbered 18 and 23. The salt water, by means of this artificially induced movement beneath the lands of Mr. Young, is carried to the processing plant * * *

Id. at 772.

The District Court ruled that the action was governed by Arkansas law, and this ruling is not contested on appeal. In dismissing the action, the court declared that the decision of the Arkansas Supreme Court in *Budd v. Ethyl Corp.*, 251 Ark. 639, 474 S.W.2d 411 (1971),[1] provided a "clear, concise and unambiguous determination of the law" to be applied. *Young v. Ethyl Corp., supra*, 382 F.Supp. at 774. Relying on that decision as controlling, the District Court held that the common law rule of "capture," as interpreted by the Arkansas Supreme Court, precluded relief.

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[1] That case involved the same recycling project and the same defendants. However, as will be seen from our discussion, *infra*, we find significant factual distinctions between that case and the case *sub judice*.

We cannot agree that the Arkansas Supreme Court decided in *Budd* that the rule of capture protects one who, by force, pushes minerals out from under the land of another when the minerals would remain in place without the application of such force. On the contrary, we conclude that the manner in which the Arkansas court dealt with the plaintiff's contentions in *Budd* indicates that that court declined to rule on the precise issue before us.

In *Budd*, the plaintiff sought an accounting for bromides removed from beneath two nonadjacent tracts of land. The Arkansas Supreme Court treated the two tracts separately, dismissing the cause of action as to each tract for different reasons. The first tract considered by the court was a 240-acre tract in which Budd owned an undivided interest in the minerals. The court found that this 240-acre tract was outside of the recycling area, although adjacent to it. Relying on the rule of capture, the court rejected Budd's contention that the *drainage* of valuable minerals from beneath the tract stated a cause of action. In support of its position, the court quoted the following language from *Osborn v. Arkansas Territorial Oil & Gas Co.*, 103 Ark. 175, 146 S.W. 122, 124 (1912):

> * * * "Petroleum, gas and oil are substances of a peculiar character. * * * They belong to the owner of land, and are part of it so long as they are part of it or in it or subject to his control; but when they escape and go into other land or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas extending under his neighbor's field, so that it comes into his well, it becomes his property." * * * [*Quoting Brown v. Spilman*, 155 U.S. 665, 15 S.Ct. 245, 39 L.Ed. 304 (1895)].

Budd v. Ethyl Corp., supra, 474 S.W.2d at 412.

Since Young's tract is within the recycling area, the state court's disposition of Budd's cause of action with respect to the 240-acre tract is not controlling.

Having disposed of the cause of action with respect to the tract lying outside of the recycling area, the Arkansas court turned to Budd's second cause of action, which was based on a 40-acre tract which the court found to be within the recycling area—that is, within the defendants' circle of injection wells. Budd owned only an undivided leasehold interest in the 40-acre tract, and the defendants owned all the rest of the tract comprising the fee simple and the remaining leasehold. Although the court could once again have relied on the law of capture, it did not do so.[2] Instead, it denied relief because of Budd's limited interest in the property. The court stressed that Budd owned only an "inchoate" interest in the 40-acre tract: the right to drill for minerals if he wished to do so. "Thus there is no trespass upon a vested existing property right * * *"[3] *Id.* 474 S.W.2d at 413. Since Young owns title to his tract in fee simple, the state court's disposition of Budd's cause of action with respect to the 40-acre tract is not controlling.

When pressed on the issue in oral argument, counsel for the defendants conceded that the Arkansas Supreme Court has

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[2] The dissenter spoke as if he thought that the majority was applying the law of capture to the tract within the recycling unit. *See Budd v. Ethyl Corp.*, 251 Ark. 639, 474 S.W.2d 411, 414 (1971) (Byrd, J., dissenting). We do not read the majority opinion to have done so.

[3] Again, the court quoted from *Osborn v. Arkansas Territorial Oil & Gas Co.*, 103 Ark. 175, 146 S.W. 122 (1912):

> * * * "A gas lease, such as is involved in this case, is a contract granting to the lessee the right to explore the land and to produce therefrom the gas therein discovered. It is not a present sale or transfer of title to the gas, but, on account of its vagrant nature, the gas does not become actually owned until actually possessed. As is said in the case of *Williamson v. Jones*, 39 W.Va. 231, 19 S.E. 436: 'The title is dependent on finding the gas by the purchaser in a limited time,'—and is inchoate."

Budd v. Ethyl Corp., supra, 474 S.W.2d at 413.

not yet held that relief for an owner in fee simple is barred by the rule of capture when minerals beneath his land are forced to migrate to the property of another by means of the other's injection wells. Accordingly, the District Court's conclusion that the Arkansas law controlling the issue is "clear, concise and unambiguous," was error. Since the issue has not been determined by the highest court of the state, it is our task to rule as we believe the Arkansas Supreme Court would rule, were the matter squarely presented to it.[4]

In our view, if the Supreme Court of Arkansas were faced with this record, it would hold that the rule of capture does not apply, and that the defendants' actions in forcibly removing valuable minerals from beneath Young's land constitute an actionable trespass. We have reached this conclusion for two reasons.

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[4] We have previously declared that "[t]he responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it." *Yoder v. Nu-Enamel Corp.*, 117 F.2d 488, 489 (8th Cir. 1941). This task becomes most difficult when state law is uncertain, but we must not shun the responsibility:

> When the rights of a litigant are dependent on the law of a particular state, the court of the forum must do its best (not its worst) to determine what that law is. It must use its judicial brains, not a pair of scissors and a paste pot. Our judicial process is not mere syllogistic deduction, except as its worst. At its best, it is the wise and experienced use of many sources in combination—statutes, judicial opinions, treatises, prevailing mores, custom, business practices; it is history and economics and sociology, and logic, both inductive and deductive. Shall a litigant, by the accident of diversity of citizenship, be deprived of the advantages of this judicial process? * * * We must not forget that a litigant has only one day in court. * * *
>
> * * * Each litigant, whether in the federal or the state courts, has a right that his case shall be a part of this evolution—a live cell in the tree of justice. * * *

Corbin, *The Laws of the Several States*, 50 Yale L.J. 762, 775-776 (1941).

First, we do not believe that the Arkansas Supreme Court would extend a rule developed in the field of oil and gas to the *forced* migration of minerals of different physical properties. The rule of capture has been applied exclusively,[5] so far as we know, to the escape, seepage, or drainage[6] of "fugacious"[7] minerals which occurs as an inevitable result[8] of the tapping of a common reservoir. The rule was adopted near the turn of the century primarily as a rule of necessity when courts concluded that the amount of oil and gas which drained toward a production well from neighboring tracts was incapable of measurement. *See generally* I Summers, The Law of Oil and Gas § 63 & n. 37 (1954). With the development of more sophisticated knowledge of geology and a greater ability to measure the amount of drainage, the absolutism with which some courts continue to apply the rule of capture to oil and gas has been criticized. *See e.g., id.* at § 63. We agree with the defendants that the Arkansas Supreme

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[5] As an example of a case where the forcing out of minerals was permitted, the defendants cite *Railroad Commission of Texas v. Manziel*, 361 S.W.2d 560 (Tex. 1962). The secondary recovery (injection) operation sustained in that case had been ordered by a state agency to further the public policy of maximizing oil recovery. Obviously, the authority of private actors is not coextensive with the powers available to a state in exercising its police powers.

[6] I Summers, The Law of Oil and Gas §§ 61-65 (1954), and the cases cited therein, consistently speak of "drainage" when discussing the rule of capture. *See, e .g., Elliff v. Texon Drilling Co.*, 146 Tex. 575, 210 S.W.2d 558, 562 (1948): "It must be conceded that under the law of capture there is no liability for reasonable and legitimate drainage from the common pool."

[7] The Oxford English Dictionary (1971), defines "fugacious" as meaning "[a]pt to flee away or flit," and "fugacity" as meaning "volatile."

[8] * * * Because of the liquid and volatile nature of oil and gas and their existence in the earth in sealed strata subject to great pressures, one landowner in a common source of supply cannot produce oil or gas therefrom without actually or theoretically causing some displacement of the oil or gas under his neighbor's land. * * *

I Summers, The Law of Oil and Gas § 62 at 157 (1954).

Court foreclosed such arguments with respect to the drainage of minerals from adjacent lands. But Young does not claim that he is losing minerals due to seepage or drainage toward the defendants' production wells. Rather, he asserts, and has established to the satisfaction of the District Court, that the brine solution under his land would not migrate to the defendants' production wells but for the force exerted by the injection wells; in other words, that the brine is primarily "non-fugacious." We believe that it would be unwise to extend the rule to situations in which non fugacious minerals are forced from beneath a landowner's property. Our conclusion in this respect is consistent with the fact that the Arkansas Supreme Court did not apply the rule of capture to the 40-acre tract in *Budd*.

Second, even accepting the defendants' contention that the brine beneath Young's land must be treated no differently than would oil or gas, the common law rule of capture is not a license to plunder. Rather, it has an important corollary in the doctrine of "correlative rights."[9] This doctrine allows owners of land to extract oil or gas from a common pool, but posits two duties which limit the right of a landowner to drain oil and gas from beneath adjacent lands: (1) the duty to other owners not to injure the source of supply; and (2) the duty not to take an undue proportion of the oil and gas from the common pool. *See* I Summers, The Law of Oil and Gas § 63 at 180-181 (1954). To violate those duties is to abuse one's correlative rights. This corollary to the rule of capture has been codified in Ark.Stat.

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[9] * * * The term "correlative rights" is merely a convenient method of indicating that each owner of land in a common source of supply of oil and gas has legal privileges as against other owners of land therein to take oil and gas therefrom by lawful operations conducted on his own land limited, however, by duties to other owners not to injure the source of supply and by duties not to take an undue proportion of the oil and gas. In addition, of course, to this aggregate of legal relations, each landowner has duties to the public not to waste the oil and gas.

I Summers, The Law of Oil and Gas § 63 at 180-181 (1954).

Ann. § 53-109(I)(3), which prohibits, as an abuse of correlative rights, "withdrawals causing undue drainage between tracts of land."[10] If causing undue drainage is an abuse of correlative rights, then *a fortiori* forcing static minerals under one's neighbor's land to migate amounts to an abuse of those rights. The defendants would have us ignore § 53-109(I)(3) by urging that salt water brine is not governed by oil and gas law. They cannot have their cake and it too; if the rule of capture is to be applied to salt water brine, the doctrine of correlative rights must likewise be applied.

We conclude that the Supreme Court of Arkansas would not apply the rule of capture to this situation and, hence, would not need to proceed to the alternative question of correlative rights. Accordingly, the appellant has a vested existing property right in the brominated salt water underlying his land, and the action of the defendants in forcibly removing that solution by means of injection and production wells on surrounding property constitutes an actionable trespass. It was improper for the District Court to dismiss the action. The order of dismissal is reversed, and the cause remanded for further proceedings as to the relief to be granted.

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[10] Ark.Stat.Ann. § 53-110 provides:

Waste of oil or gas as defined in this act is hereby prohibited.

APPENDIX T

(District Court Opinion Dated Feb. 24, 1977)

J.M. YOUNG,

Plaintiff,

ETHYL CORPORATION, et al.,

Defendants.

No. ED-72-C-6

United States District Court
W. D. Arkansas
El Dorado Division

Feb. 24, 1977

A landowner brought an action against owner of mineral rights in surrounding lands, seeking an injunction and damages or an accounting for defendants' actions in forcibly removing valuable minerals from beneath plaintiff's land by means of injection and production wells on the surrounding property. The United States District Court for the Western District of Arkansas, 382 F.Supp. 769, Oren Harris, J., dismissed the complaint after a trial on the merits, and landowner appealed. The Court of Appeals, Heaney, Circuit Judge, 521 F.2d 771, reversed and remanded. Thereafter, the District Court, Paul X Williams, Chief Judge, announced a just and equitable remedy taking into consideration the law of the case as announced by the Court of Appeals, the Arkansas cases concerning remedy and all of the competent and relevant evidence submitted.

Judgment accordingly.

1. Trespass Key 44

Burden of proof was on defendant to show that its trespass was in good faith.

2. Federal Courts Key 950

An opinion of the Court of Appeals reviewing a decision of the district court in the 8th circuit is the "law of the case" as announced by the circuit court in its reversing and remanding order.

See publication Words and Phrases for other judicial constructions and definitions.

3. Mines and Minerals Key 51(3)

Evidence, in action by landowner against bromine plant owner who by use of injection and production wells knowingly and forcefully removed valuable minerals from lands of plaintiff and voluntarily commingled the brine bearing bromine and other valuable minerals from plaintiff's land with that which it recovered from other such brine in the field and from it, as commingled, produced bromine, ethylene dibromide, vinyl bromide and sulphur, established that trespass of defendant was an "in good faith" trespass as that term was used in describing trespass and remedies for trespass.

4. Mines and Minerals Key 51(2)

Just and equitable remedy was set forth in case involving "in good faith" trespass by bromine plant owner who by use of injection and production wells knowingly and forcibly removed valuable minerals from lands of plaintiff and voluntarily commingled the brine bearing bromine and other valuable minerals from plaintiff's land with that which it recovered from other such brine in the field and from it, as commingled, produced bromine, ethylene dibromide, vinyl bromide and sulphur.

Memorandum Opinion On Rule 59 Motion

5. Federal Civil Procedure Key 2331

Trial court will not grant new trial unless it is reasonably clear that prejudice or error has crept into the record or that substantial justice has not been done; furthermore, burden of showing harmful error rests on party seeking new trial. Fed.Rules Civ.Proc. rule 59, 28 U.S.C.A.

6. Mines and Minerals Key 2331

Evidence on motion for new trial by bromine plant owner, which had been found a "good faith trespasser" in connection with its removal of valuable minerals from owner's lands by use of injection and production wells, but which now contended that court mismatched costs and revenues and omitted cost items despite fact that owner in its discretion did not make allegedly omitted items available during trial, did not demonstrate that substantial justice had been denied either party by award to landowner for continuing trespass so as to entitle plant owner to a new trial.

7. Federal Courts Key 950

Law of case, as stated by the Court of Appeals, required district court to fashion equitable remedy for bromine plant owner's trespass in connection with its removal by injection and production wells of valuable minerals from owner's lands and its voluntary commingling of brine bearing bromine and other valuable minerals from land with that recovered from other such brine in field, despite plant owner's contention that no law of Arkansas permitted court to fashion an equitable remedy under the circumstances.

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Melvin T. Chambers, Chambers & Chambers, Paul C. Crumpler, Anderson & Crumpler, Magnolia, Ark., for plaintiff.

Robert J. Malinak, Baker & Botts, Houston, Tex., for defendants.

Memorandum Opinion

PAUL X WILLIAMS, Chief Judge.

The District Court's opinion in the original trial of this case appears at *382 F.Supp. 769 (1974)—(Judge Harris)*

On appeal the decision of the district of the district court was reversed and the case remanded. The opinion of the Court of Appeals (8th Circuit) appears at *521 F.2d 771 (1975)*. In the opinion of the Court of Appeals appears the following language:

> ". . . In our view, if the Supreme Court of Arkansas were faced with this record, it would hold that the rule of capture does not apply, and that the defendants' actions in forcibly removing valuable minerals from beneath Young's land constitute an actionable trespass."

and at page 775:

> "Accordingly, the appellant has a vested existing property right in the brominated salt water underlying his land, and the action of the defendants in forcibly removing that solution by means of injection and production wells on surrounding property constitutes an actionable trespass."

The Court of Appeals concluded by stating:

> "The cause is remanded for further proceedings as to the relief to be granted."

Pursuant to that mandate, trial was resumed and evidence taken to determine the relief to which J. M. Young is entitled.

The jurisdiction of this court was announced in the first trial in the following language:

> "Jurisdiction having been established by diversity, the substantive law of the State of Arkansas, as expressed by the State's highest court, is applicable. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Midstates Oil Corp. v. Waller*, 207 F.2d 127, 130, 131 (5 C.A. 1953); 28 U.S.C.A. § 1652."

The statement of facts in the district court's published opinion in 382 F.Supp. 769 is a fair statement of the true facts with a few changes which have come to light since that trial. In that regard we note it is now stipulated that Mr. Young owns 169.1 acres rather than 180 acres as was first assumed; and the Court in this trial now finds that the Kerlin-Brine field contains 15,040 acres, as distinguished from the 16,000 acre figure assumed in the original trial. The Court finds that Mr. Young's 169.1 acres is a part of the 15,040 acre Kerlin field and constitutes 169.1/15,040ths thereof. The 15,040 acre Kerlin field is specifically described on a plat attached hereto as Appendix "A" and made a part of this opinion.

The defendant, Ethyl has caused both injection and production wells to be drilled. The injection wells form a rough circle on the periphery of the Kerlin field with the production wells operating within the circle.

The debrominated effluent is injected by means of the injection wells and the pressure forces the underground brine bearing bromine and other valuable minerals to the production wells.

> The plaintiff's lands are surrounded by the lands leased and purchased in fee by defendants within the Southwest area of the Kerlin Brine Feld. An injection well, number 13, is located adjacent to and South of the plaintiff's lands, which, as shown by a preponderance of the evidence, forces

> the product to production wells numbered 18 and 23. It is established, and undisputed, that the injection of debrominated waters from the defendants' plant through well numbered 13, under high pressure, displaces the brine waters in the formation underlying the plaintiff's lands, forcing it to move toward, and eventually produce through wells numbered 18 and 23. The salt water, by means of this artificially induced movement beneath the lands of Mr. Young, is carried to the processing plant where the valuable mineral bromine is removed and sold. This recycling process has continued since the inception of the production and processing in 1969. 382 F.Supp. 769, 772.

It is undisputed that Ethyl (by use of the injection and production wells) knowingly and forcibly removed valuable minerals from the lands of Mr. J. M. Young, and voluntarily commingled the brine bearing bromine and other valuable minerals from Mr. Young's land with that which it recovered from other such brine in the Kerlin field and from it, as commingled, produced bromine, ethylene dibromide, vinyl bromide and sulphur.

It is also undisputed that Ethyl obtained permits from the Arkansas Oil and Gas Commission for the drilling, location and operation of all its injection and production wells.

The Court finds that Arkansas has no laws either requiring or prohibiting the pooling or unitizing of a common source of such materials as those of the Kerlin field; and this court specifically finds that the 15,040 acre Kerlin field was and is a common source of supply of brine bearing bromine and other valuable minerals as that term is used by the Court of Appeals of the 8th Circuit in its opinion, reported at 521 F.2d 771, which stated the law of this case.

Since the law of this case was determined and announced by the Court of Appeals to be that the defendant's action in forcibly removing valuable minerals from beneath Mr. Young's land

constitutes an actionable trespass it becomes necessary to determine whether or not the trespass was "willful" or "in good faith" as those terms are used in the law.

The defendant Ethyl contends that the trespass was "in good faith" and damages should be awarded on that theory.

The plaintiff Young contends that the trespass was "willful" and damages should be awarded on that theory.

[1] The burden of proof is on defendant, Ethyl, to show that its trespass was "in good faith." 168 Ark. 853 at 857, 272 S.W. 353 (1925)

The evidence shows that Ethyl's salt water bromine recovery program in Columbia County, Arkansas, hereafter referred to as the Kerlin Field program, was very carefully planned and skillfully carried out by extremely capable and well financed people after obtaining top-flight legal advice from outstanding and able attorneys who sincerely believed it was the law of Arkansas that the Defendant could do just exactly what the defendant did, i.e. lease in a checkerboard fashion and put in operation both injection and production wells drilled to the Smackover formation in Kerlin field in Columbia County, Arkansas. In actual practice, Ethyl sought to obtain specially written leases from all the owners of those lands comprising the Kerlin field after obtaining the expert services of exceedingly able counsel in Arkansas to write a lease designed to cover a brine operation; and it sought both to buy the lands of J. M. Young and also to lease his lands. Ethyl offered to lease from him on the same terms as it leased from other land owners in the Kerlin field.

Mr. Young owned 169.1 acres of the 15,040 acres comprising the Kerlin field, and he refused to sell or lease to the Defendant. Defendant knew it did not own or have a lease on the Young lands. There is no question as to boundaries and Defendant knew it did not have a lease or own any interest in his land or the minerals contained therein.

Defendant, Ethyl, relying on its expert legal advice that it had a legal right to inject water into lands adjoining Young's land and force the brine containing valuable minerals from under Young's land to production wells also on Deefndant's leased lands, followed that course of action deliberately. There was no mistake by the defendant as to what it was doing or the fact that it intended to recover the brine and minerals from under the Young land. In the 1974 opinion, this Court (by Judge Harris) held that there was no law violated by defendant's actions, i.e. not only did the defendant, Ethyl believe the law of Arkansas was not being violated by her course of action, but this court in its opinion reported at 382 F.Supp. 769 (1974) (opinion by Judge Harris) specifically found and announced as the law of Arkansas that Ethyl's course of action was within the law. Thus we see conclusively that it was the last and most recent announcement of the law of Arkansas until the Court of Appeals of the 8th Circuit reversed this district court and announced the law of this case to be that under the proved facts there was an ationable trespass.

[2] An opinion of the Court of Appeals reviewing a decision of a district court in the 8th Circuit is the "law of the case" as announced by the circuit court in its reversing and remanding order. In the case of *Nucor Corp. v. Tennessee Forging*, 513 F.2d 151 (1975) at page 153 the court used the following language in discussing the "law of the case," to-wit:

> When a case has been decided by this court on appeal and remanded to the District Court, every question which was before this court and disposed of by its decree is finally settled and determined. The District Court is bound by the decree and must carry it into execution according to the mandate. It cannot alter it, examine it except for purposes of execution, or give any further or other relief or review it for apparent error with respect to any question decided on appeal * * * *Thornton v. Carter*, 109 F.2d 316, 319, 320 (8th Cir. 1940). See *Richardson v. Communications Workers of Amer., AFL-CIO*, 486 F.2d 801, 804 (8th Cir. 1973); *Cherokee Nation v. State of Oklahoma*, 461 F.2d 674, 677, 678 (10th Cir.), cert. denied, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed2d 489 (1972); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 177 (2nd Cir. 1967), cert. denied, 390 U.S. 956, 88 S.Ct. 1038, 20 L.Ed.2d 1151 (1968); *Paull v. Archer-Daniels-Midland Company*, 313 F.2d 612, 618 (8th Cir. 1963); 6A Moore's Federal Practice, Par. 59.16 (1974).

In 1975 the Court of Appeals for the Eighth Circuit declared and it is the law of this case that the Defendant's action was a trespass and that valuable minerals were taken. The trespass was an act done deliberately by very smart and able operators who intended to and skillfully did exactly what they deliberately planned to do, which was to remove brine bearing bromine and other valuable minerals from the Smackover formation under the lands belonging to J. M. Young.

At the same time we find that the motive of the defendant, Ethyl, was based on a sincere belief it had a legal right to do what it was doing.

Judge Harris's opinion reported in 382 F.Supp. 769 is enough alone to show conclusively that, in law, the trespass was in good faith.

In the case at bar we have also the written opinion of both Texas and Arkansas attorneys, well advised in such matters and completely able in the oil and gas legal business, who advised the defendant that its course of action was legal. The evidence heavily preponderates to a finding that the action of the defendant was "in good faith".

[3] The Court specifically finds and holds in this case that the trespass of Ethyl was an "in good faith" trespass as that term is used in describing trespass and remedies for trespass.

Now we turn to the matter of a just and equitable remedy for trespass "in good faith".

The law of the State of Arkansas was discussed in the case of *National Lead Co. v. Magnet Cove Barium Corp.*, W.D.Ark., 231 F.Supp. 208 (1964) (Judge John E. Miller) where at pages 217-218 appears the following language:

> There are two general measures of damages for trespass to minerals which are described as the "mild" and the "harsh" rules. The "mild" rule applies where the trespass is inadvertent, innocent or not in bad faith, and fixes the damages as the value of the minerals in situ. The so-called "harsh" rule, applied when the trespass is wilful, intentional, or in bad faith, allows the injured party the enhanced value of the product at the time of conversion.
>
> Within the framework of the mild measure, there are two different guidelines to determine the in-place value of ore: first, the royalty value whereby the injured party is allowed as damages an amount equivalent to the value of the privilege of mining and removing the minerals; second, another application of the mild rule allows the injured party to recover the value of the minerals after extraction less a credit to the trespasser of its production costs. The effect of allowing the royalty method as damages is not to punish the nonwilful trespasser, but to compensate the injured party for being deprived of the possibility of extracting the minerals. Alternatively, allowing the injured party to recover the enhanced value of the converted minerals with a deduction in favor of the trespasser for the cost of mining them will also compensate for being deprived of the right of mining the minerals and developing them, while preventing the trespasser from profiting from his wrongdoing. When the royalty method is used in applying the in-place measure of damages, the question of allowance to the trespasser of credit for his expenses in producing the minerals is not reached.

In the case at bar, the court specifically finds that the quantity of bromine bearing brine removed from the lands of J. M. Young prior to July 1, 1976 was 7,612,000 barrels. We adopt this figure as the finding of this court and it is based on the testimony of Defendant's witness Garms, and defendant's exhibit 77 introduced while Mr. Garms was giving his testimony. The Court recognizes that higher estimates were made by other witnesses, especially the witnesses for the plaintiff. But Mr. Garms was offered as a witness by the defendant, Ethyl. He is an employee of Core Laboratories and owns no interest in the subject matter of this law suit. Mr. Garms'-evidence (as shown by Defendant's exhibit 77) shows the number of barrels of brine recovered from Young's land in each of the producing years prior to July 1, 1976 and also the amount in pounds of bromine that was actually produced by Ethyl from the 7,612,000 barrels of brine. That amount is shown by years and totals 16,447,000 pounds. The pertinent part of exhibit 77 is as follows:

169.1 ACRE BASIS

NET 5000 PPM* BRINE SWEPT 10^6 STD BBLS	NET WEIGHT BROMINE SWEPT 10^6 POUNDS
1.057	2.282
3.374	7.284
1.700	3.671
0.834	1.801
0.234	0.504
0.430	0.930
−0.017	−0.025
7.612	16.447 lb.

*Note: PPM means "parts per Million".

The plaintiff contends that he is entitled to receive from Ethyl the market value of the bromine computed at the price pub-

lished by the U.S. Department of Mines for the year shown plus interest at legal rate on the sales of each year. Mr. Paul Waddle, an expert witness for the plaintiff testified that the Bureau of Mines figures were as follows:

1969	19.01 cts	1970	17.32 cts	1971	17.35 cts
1972	16.46 "	1973	16.05 "	1974	27.24 "

Mr. Waddle further testified that approximately 95% of the valuable brine from Young's land had already been displaced by the recovery practices (injection and production wells) of Ethyl and estimated that the total value of bromine and sulphur displaceable from Young's land amounted to $6,584,134.00.

Exhibit 28 introduced as exhibit to Waddle's testimony is as follows:

AMOUNT AND VALUE OF ELEMENTAL BROMINE AND SULPHUR DISPLACEABLE FROM J. M. YOUNG LANDS

BROMINE-BEARING BRINE DISPLACEABLE FROM J. M. YOUNG'S LANDS

Volume ..... 12,836,816 Barrels
Bromine Recovery ..... 2.1 Pounds per bbl

BROMINE DISPLACEABLE FROM J. M. YOUNG'S LANDS:

Amount of Bromine .....26,957,314 Pounds
Value of Bromine $6,531,757

SULPHUR DISPLACEABLE FROM J. M. YOUNG LANDS

Amount of Sulphur .....5,076,736 Pounds
Value of Sulphur $52,377

TOTAL VALUE OF BROMINE AND SULPHUR DISPLACEABLE FROM J. M. YOUNG LANDS $6,584,134

On the other hand the defendant, Ethyl Corporation contends that since its trespass was in good faith, at most, it should pay only the value of the brine at the well head, or preferably only a royalty percentage on that, which value could be from nothing to as much as 5 cents a barrel.

While Ethyl forcefully urges that we are dealing with salt water or brine and its market value and royalty value, this Court

specifically holds that we are dealing with the minerals, bromine, ethylene dibromide, vinyl bromide and sulphur.

The defendant Ethyl is in actuality the only defendant left in this law suit and it frankly admits that it is the one who operates the Kerlin field and it is the one who produced the brine from under Mr. Young's land, commingled it with the other field brine and extracted the valuable minerals therefrom and marketed them, the end products being marketed as bromine, ethylene dibromide, vinyl bromide and sulphur. Ethyl jealously guards its technical knowledge, does not intend to willingly make public the manner in which it operates, and did not permit the witnesses for the plaintiff to inspect its processing plant when plaintiff initially sought discovery in order to present its claim for damages. Ethyl zealously contends that at most, it is liable only for the value of the brine, or royalty per cent thereof. It starkly contends that it is entitled to profit from its trespass because of its skill and know-how; and that regardless of the trespass, Mr. Young should only receive what he would have received had he leased to Defendant in the beginning.

The Court notes that even if it were possible to inject 7,612,000 barrels of brine with exactly the same chemical content as that extracted from under Mr. Young's land back into Young's land it would not negative the trespass. The injection process has occurred already. It is now impossible to undo what Ethyl has done. In fact, while Ethyl has shut down the closest injection well, which it did shortly after the Court of Appeals opinion in 1975, nevertheless it is still operating the field and is injecting effluent in tremendous quantity through other injection wells. The trespass has been committed. It can no more be undone at this time than one can unring a bell that has been rung or unfire a shot that has been fired.

Ethyl contends that its know-how and technical knowledge belong exclusively to it and that Mr. Young is not entitled to

profit from these proprietary factors that belong exclusively to Ethyl, even though Ethyl has netted a large profit by its trespass.

The Court recognizes that Ethyl actually wrongfully removed the 7,612,000 barrels of brine prior to and up to July 1, 1976 and continues to operate the Kerlin field of which Mr. Young's land is a part. The injection and production well method is still being utilized and it is doubtless the best and proper way to make a maximum recovery from the Kerlin field.

The defendant, Ethyl Corporation commingled the brine from Young's land with vast quantities of other brine without the consent of Mr. Young and treated it and turned it into valuable merchandise. While Mr. Young contends that he is entitled to the full value of the bromine, etc., the Court finds that a more equitable remedy is indicated in this case where the size of the Kerlin field has been determined and we know the number of acres owned by Mr. Young.

Mr. Young made no contribution to Ethyl's investment in this plant and the gathering and treating facilities. However, he did not ask for or consent to the trespass, the commingling or the processing and disposing of the bromine, the dibromide, the vinyl bromide or the sulphur, or to the re-injection of the treated effluent back into the Smackover formation.

We note that the market value of the brine bearing bromine and other valuable minerals was and is very low (about 2 to 5 cents a barrel) and that Mr. Young could hardly be expected to provide himself with a $45,000,000 facility and an expensive operation to process his brine; but we also note that he is the victim of a trespass, which gives him the right to a fair and equitable remedy.

The defendant voluntarily processed the brine taken from Mr. Young and turned it into valuable merchandise and then sold it and has had the use of the sales money in increasing sums since

1969. Certainly defendant, Ethyl, should not be permitted to profit from its trespass.

The case at bar is not a coal, oil or mineral case in the sense that the Arkansas Supreme Court has up to this time considered and announced a specific remedy for the taking of brine bearing bromine and other minerals as has occurred here.

We have already quoted from the excellent opinion in the *National Lead Co. v. Magnet Cove Barium Corp.*, 231 F.Supp. 208 (1964) (authored by Judge Miller) and now quote from page 221 as follows:

> As to a landowner who has not the opportunity nor the equipment to develop minerals, the amount for which he can lease them, or royalty value, is the generally accepted measure of damages as to him for an innocent trespass and conversion of minerals. However, as to the mineral lessee with the desire, ability and facilities to mine and develop minerals, the royalty value does not adequately compensate him for being deprived of the opportunity to exercise his mining rights. To place the mineral lessee in the position that he would have been had the injury not occurred is to at least compensate him for the net amount he would have realized by the exploitation of his mining rights as determined by the particular facts and circumstances of each case. the court has no desire to "punish" the defendant corporation, but at the same time it *must not allow a trespasser to profit from his own wrongdoing*. Thus, the court is of the opinion that the inplace value as to a mining lessee, such as the plaintiff here, is the enhanced value of the ore with a credit to a nonwilful trespasser for its costs. By this approach the plaintiff mineral lessee is put in the place it would have been had it not been deprived of the opportunity of mining its ore, while at the same time depriving the trespasser of any profit from its wrongdoing,

but yet inflicting no punishment on the trespasser by the allowance of its expenses or costs in removing and developing the ore. (Emphasis added.)

This Court is not unaware of the case of *Burbridge v. Bradley Lumber Co.*, 218 Ark. 897, 239 S.W.2d 285 (1951) in which remedy for innocent conversion of timber was discussed and the remedy announced by the Arkansas Supreme Court. In a unanimous decision the court used the following language at pages 902-903, 239 S.W.2d at page 288:

> "The case at bar presents the issue of which rule this court is now going to follow as the law of this State. We are of the opinion that the rules as laid down in the *Eaton* case is the 'wisest and most just,' as stated there by Mr. Justice Battle, and we therefore follow that rule.
>
> Mr. Justice Battle said:
>
> 'In considering the justice of permitting the appellant to appropriate the cross-ties to his own use, the invasion of his rights and the injury done to him by appellee should not be overlooked. The trees belonged to him. They were standing upon his land, and he had the right to hold them as they were. No one had the right to take them from him, convert them into ties, and force him to accept their value at the time of the conversion. He may have preferred to have them to stand, and, if left standing for a few years, they might yield him great profit; and the enhancement of their value by the labor of appellee might be a poor compensation for the wrong done. But, whether he wished to sell or not, it would be gross injustice to permit appellee to force him to sell. He is entitled to the protection of the laws. Deny to him the right to the cross-ties, and force him to accept the value of his timber when appropriated by a trespasser, as it was at the time of the conversion, and he had no adequate protection. The injury inflicted by the

> trespasser would be borne in part by the innocent owner, and the guilty would escape. "Such a doctrine," as said by Chief Justice Cooley, "offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespass the appearance of an innocent mistake." '
>
> In the *Eaton* case [*Eaton v. Langley*, 65 Ark. 448, 47 S.W. 123] it was recognized that in some instances the cost of conversion and the value added by reason of the conversion would be out of all proportion to the value of the original article, and the injustice of permitting a recovery of the value of the property as converted would be apparent at first blush. However, we are not dealing with an instance of that kind in the case at bar.
>
> The original owner is entitled to recover the value of the property in its new form less the cost of labor, material and incidental items necessarily expended in transforming it, provided the expenditures do not exceed the increase in value which was added by the transformation, in which event he should recover the value of the property in its new form, less the increase in value."

[4] The task of this Court is to announce a just and equitable remedy taking into consideration the law of the case as announced by the court of appeals, the Arkansas cases concerning remedy and all of the competent and relevant evidence submitted.

The Court refuses to find in this case that Mr. Young did not have the "desire" to develop the brine bearing minerals from his 169.1 acres and the Court finds that while it is "probable" that Mr. Young did not have the ability and the facilities to recover, and treat his minerals, we refuse to make a specific finding to that effect since in this day and time when the value of such minerals is at a high level and the market more readily available,

there is a distinct possibility that Mr. Young could have mined and developed his own minerals or leased to someone who actually had the ability and the facilities. We specifically find that the Defendant, Ethyl, as a trespasser, is not entitled to profit from its own wrongdoing.

Here Defendant voluntarily used its expensive facilities, its skill and know-how and turned its brine and that of Mr. Young into something valuable; and we have only praise for the venture, know-how and the skill that has turned harmful, unwanted brine into a valuable asset and returned the de-brominated effluent into the Smackover formation.

We also recognize that it took not only the expensive facilities and the American resourcefulness, daring and know-how, but it also took money to defray the cost of the overall operation and make it possible to show a profit.

The records of Ethyl Corporation (carefully kept), as testified to by defendant's employee and witness, Mr. Andrew, (exhibit 92) show that the entire production of valuable minerals from the Kerlin field of 15,040 acres from the time it first began to operate in 1969 until July 1, 1976 amounted to $176,628,-439.00.

From all the evidence in the case, this Court specifically finds that as of July 1, 1976 the Defendant without permission from Young, had removed 7,612,000 barrels of brine bearing valuable minerals and converted it into bromine, ethylene dibromide, vinyl bromide and sulphur. It was commingled with other brine from the Kerlin field and was processed by the Defendant in its plant near Magnolia producing:

Elemental bromine worth	$ 4,540,596.00
Ethylene dibromide worth	154,394,476.00
Vinyl bromine worth	14,087,900.00
Sulphur worth	1,605,467.00
Making a grand total of	$174,628,439.00

produced from the 15,040 acre field including the brine from Mr. Young's land (169.1 acres); and that in producing these valuable products the Defendant used its plant, its gathering facilities and treatment plants which was necessary for it to use in processing its own legally acquired bromine bearing brine.

Mr. Young also contends that he is entitled to his per acre share of this total sum without in any way having to contribute to the cost of the operation.

The Court finds that since it was a "trespass in good faith" it is more equitable that the cost of the operation should also be considered because even though the defendant committed a trespass against Mr. Young it was plainly entitled to process its own brine and had it not been processing its own brine there would have been no processing of the brine from Mr. Young's land.

Defendant's Exhibit 92 (Mr. Andrew) shows from the carefully kept records of Ethyl that the cost of producing the merchandise was $75,021,000 for the period of time from 1969 up to July 1. 1976.

Ethyl's cost figures, as carefully kept and computed by Ethyl's witness, Mr. Andrew is set forth in Defendant's Exhibit 92 as follows:

Costs, $M	'69	'70	'71	'72	'73	'74	'75
Brinefield and wells	1,788	3,525	3,389	3,685	3,764	6,408	5,652
Chlorine, net brinefield	536	1,428	1,255	1,357	1,893	2,369	3,155
Other chemicals	151	226	139	154	202	257	201
Utilities	310	684	721	809	1,346	1,085	1,347
Plant factory & trailers	469	984	665	734	843	1,146	1,158
Depreciation							
Brinefield & wells	207	567	551	635	608	719	964
Plant	329	675	611	607	621	796	756
Supplementa.							
R&D Technical Service	269	730	318	551	339	282	254
Engineering	49	10	6	7	30	85	112
Legal	26	16	6	12	18	33	31
Marketing	30	33	36	40	43	46	50
Administration	211	75	80	90	100	80	—
Finance	60	66	72	80	86	92	100
Total Supplemental	645	930	518	780	616	618	547
Knowhow	110	216	216	216	216	216	216
Subtotal	4,545	9,235	8,065	8,977	10,109	13,614	13,996
Interest at 6%	411	941	920	822	797	1,205	1,384
	4,956	10,176	8,985	9,799	10,906	14,819	15,380

The Court finds these costs to be correct and totals $75,-021,000.

When the cost of $75,021,000 is deducted from the total income of $174,628,439.00 it is revealed that the net profit to Ethyl from the total Kerlin field operation up to July 1, 1976 was $99,607,439.00 or a profit per acre of the 15,040 acre field of $6,622.84.

When the acre profit is applied to Mr. Young's 169.1 acres we get a figure of $1,119,922.24 which the Court finds is the just and equitable amount which Mr. Young is entitled to receive from the Defendant, Ethyl Corporation, for operation

from 1969 up to July 1, 1976 to negative the profit to Ethyl from its continuing trespass and to provide a just and equitable remedy to Mr. Young. The judgment should bear interest at 6% per annum from the date of judgment and the costs of this case should be awarded against the defendant, Ethyl Corporation. No interest should be awarded prior to judgment because of the "good faith" of Ethyl.

The Court finds that the past use of injection wells in the Kerlin field by the Defendant requires that this Court direct Defendant to keep accurate records of total revenue and total costs from and after July 1, 1976 on the Kerlin field operation and that Defendant pay each ear 169.1/15,040ths of the net profit from the operation of the Kerlin field to J. M. Young, his successors or assigns, supplying Mr. Young with an accurate accounting as to how the amount paid is determined.

Plaintiff's contention that a disproportionate portion of the common supply described as the Kerlin 15,040 acre field has already been taken from Young's land, is taken care of by directing defendant to account for and pay to plaintiff a 169.1/15,040th so long as the Kerlin field operation is continued just as though it were a unitized operation. In fact it is advantageous to plaintiff since he is not required to pay and part of the initial expense and of building the plant.

And the Court finds it to be an equitable and just advantage due to plaintiff because of the continuing trespass by defendant and the deliberate forced taking of the brine bearing valuable minerals from plaintiff without his consent and is required in order to prevent defendant from making a profit from its trespass.

If, in fact, a disproportionate quantity has already been taken it will adjust itself by the continuous 169.1/15,040ths payment when the Young land may not be producing as much as other parts of the field.

As to all named Defendants except Ethyl the complaint should be dismissed.

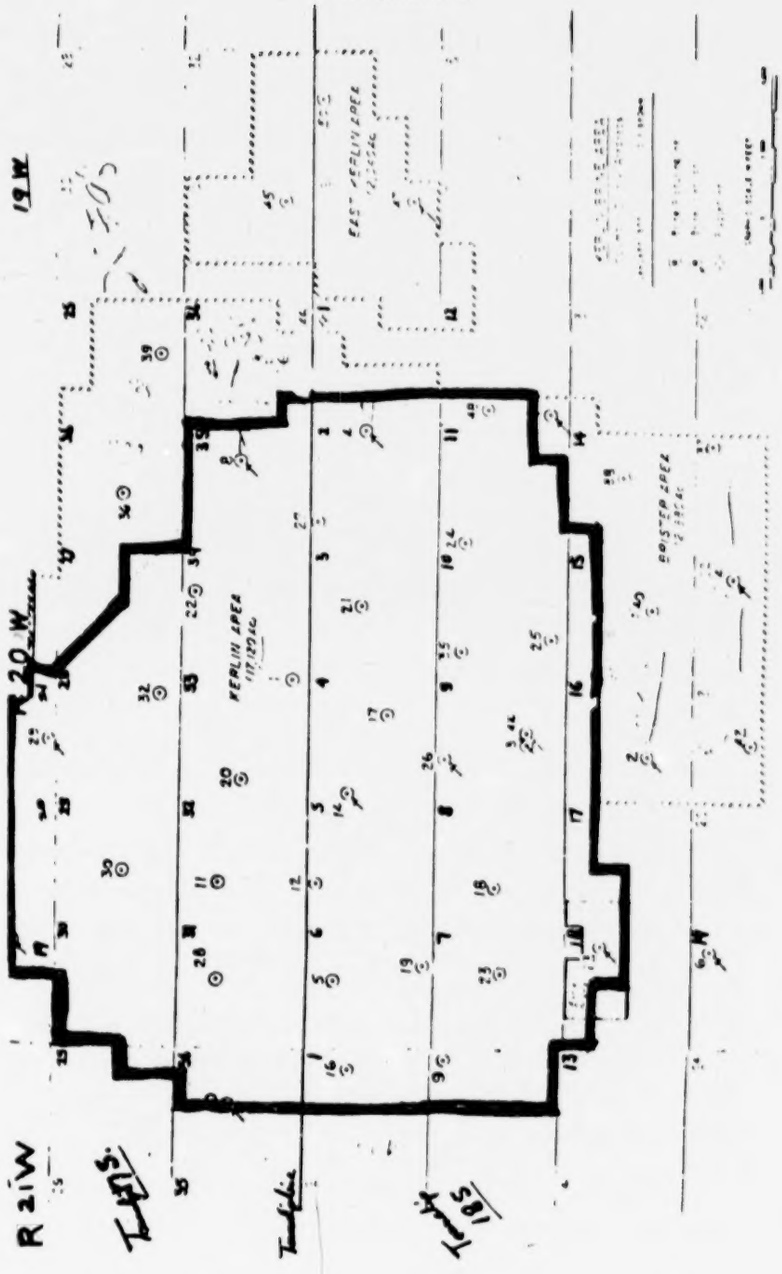
One other matter deserves comment by the Court since it was intimated that there was a breach of ethics by Mr. Young and his attorneys in the contingency aspect of trial preparation and presentation of proof. This Court finds no proof of unethical conduct.

The Clerk will prepare proper judgment and order for a continuing accounting.

Appendix A to follow.

YOUNG v. ETHYL CORP.
Cite as 444 F. Supp. 287 (1977)

APPENDIX A



JUDGMENT AND ORDER

Pursuant to the Court's Memoradum Opinion filed this 24th day of February, 1977, it is adjudged and ordered as follows:

1. The Kerlin brine field in Columbia County, Arkansas, is hereby determined to contain 15,040 acres, situated in the follow-section and part sections, as shown by the attached plat:

Township 17 South, Range 20 West: part of sec. 19, part of sec. 20, part of sec. 21, part of sec. 27, sec. 28, sec. 29, sec. 30, sec. 31, sec. 32, sec. 33, sec. 34, sec. 35, part of sec. 36.

Township 17 South, Range 21 West: part of sec. 25, part of sec. 36.

Township 18 South, Range 20 West: part of sec 1, sec. 2, sec. 3, sec. 4, sec. 5, sec. 6, sec. 7, sec. 8, sec. 9, sec. 10, part of sec. 11, part of sec. 12, part of sec. 15, part of sec. 16, part of sec. 17, part of sec. 18.

Township 18 South, Range 21 West: part of sec. 1, part of sec. 12.

2. J. M. Young is hereby determined to own 169.1 acres of the 15,040 acre Kerlin field.

3. IT IS ORDERED AND ADJUDGED that the Plaintiff have judgment against the Defendant, Ethyl Corporation, for $1,119,922.24, and costs of this action, said judgment to bear interest at six per cent (6%) per annum from date of judgment.

4. IT IS ORDERED that Plaintiff's cause of action against the limited partnership, Bromet Company, against Great Lakes Chemical Corporation, and against Calvert Exploration Company be dismissed.

5. IT IS FURTHER ORDERED that the Defendant, Ethyl Corporation keep accurate records of the total revenue derived

from its operations in the Kerlin field and the total costs expended in such operations and that the Defendant, Ethyl Corporation, account and pay each year to Plaintiff 169.1/15,040ths of its net profit from the operation of the Kerlin field; and that the accounting will date from July 1, 1976, and continue until bromine, ethylene dibromide, vinyl bromide and sulphur production operations cease within the Kerlin field. It is further directed that the Defendant, Ethyl Corporation, keep proper accounting records and submit to Plaintiff, Young, or his designated representative at each pay period as above directed.

6. A copy of this judgment and order will be recorded in the records of Columbia County, Ark., by the Clerk of the Court, and cost of recording charged as costs herein.

MEMORANDUM OPINION ON RULE 59 MOTION

After an intensive and thorough trial this Court on February 23, 1977 rendered a written opinion finding that the defendant, Ethyl Corporation, should pay $1,119,922.24 to the plaintiff, J. M. Young for the continuing trespass against Mr. Young as damages up to July 1, 1976; and that each year thereafter Ethyl should make an accounting of its profits from the 15,040-acre Kerlin brine field and pay to Mr. Young, his assigns and successors 169.1/15,040ths of the net.

Immediately thereafter on or about March 4, 1977 Ethyl filed motion for new trial and amendment of judgment. Attached to its motion was the affidavit of Mr. Lloyd Andrew who had testified at the trial in chief.

This Court directed that complete discovery be made available and as a result thereof the deposition of Mr. Andrew was taken on July 12, 1977.

Hearing on the Rule 59 Motion was set for final presentation and argument on September 7, 1977 in the United States District Court room at El Dorado, Arkansas.

At that hearing the deposition of Mr. Andrew was introduced in evidence and in addition Mr. Andrew appeared in person and was examined and cross-examined.

At the conclusion of all evidence on the Rule 59 Motion the Court heard oral argument of the attorneys.

The Motion was taken under advisement and the same is now ready for decision.

In view of the objections made to introducing evidence on the Motion, we first discuss the applicability of Rule 59 to the situation and facts existing in this case and hold that the Defendant's motion and all evidence received thereon are properly before the Court at this time.

[5] Rule 59 gives the trial judge power to prevent what he considers to be a miscarriage of justice if and when such a miscarriage is demonstrated. However a court will not grant a new trial unless it is reasonably clear that prejudice or error has crept into the record or that substantial justice has not been done. Furthermore, the burden of showing harmful error rests on the party seeking the new trial.

In the case of *Call Carl, Inc. v. BP Oil Corporation*, D.C., 403 F.Supp. 568 at page 577 appears the following language:

> On a motion for a new trial under Fed.R.Civ.P. 59, a verdict may be set aside and a new trial granted when a new trial would be in the interest of justice, *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 352 (4th Cir. 1941). The burden of showing error at trial warranting a new trial rests on the party seeking a rehearing of the merits. 11 C. Wright and A. Miller, Federal Practice and Procedure, Civil § 2083, at 32 (1973).

Plaintiff's motion contains 17 paragraphs.

Paragraph one is a correct quotation from Rule 59.

Paragraph two states, that the affidavit of Mr. Andrew is attached.

[6] Paragraph three states that Ethyl agrees that the Court correctly found that Ethyl was a "good faith trespasser", but that the Court mistakenly applied the incorrect rule of damages and avers that the Court mismatched costs and revenues and omitted the cost items for the first six months of 1976.

The obvious answer to Ethyl's contention in this regard is to call attention again to Exhibit 92 which reveals that no costs for 1976 are shown by that exhibit or any other evidence before the court at time of trial in chief.

The Court notes that all evidence in the case was concluded by Ethyl without Ethyl offering any evidence as to costs for the first six months of 1976, and Ethyl's present contention reveals that it had the information in its hands and chose not to reveal it to the Court.

The Court further notes that Mr. Andrew, on questioning by the Court on September 7, 1977 stated that the costs of the first six months of 1976 could be used in the next yearly accounting and it could be done with no particular inconvenience or difficulty. He referred to Defendant's Exhibit 109 and stated that said exhibit revealed the additional Bromine cost to be $8,565,000 for the first six months of 1976.

This information was no part of the proof before the Court when the case was decided. Ethyl, in its discretion, saw fit not to make this information available to the Court when the Court was attempting to adjudge a fair and equitable remedy in damages for a trespass and the conversion of the materials acquired by reason of the trespass.

Ethyl freely stated that it offered no evidence of costs because it considered, and its theory was, that Mr. Young could recover only a royalty on the brine bearing bromine that came from Mr. Young's land. Ethyl still contends the same thing.

The plaintiff, Mr. Young and the Court in fashioning an equitable remedy were and are almost totally reliant on the records of income and expense kept exclusively by Ethyl and disclosed by Ethyl reluctantly or when ordered by the Court to do so. We refer to that as a fact and not as a criticism since the Court recognizes that Ethyl is trying to make money by using its records and facilities to its own best interest.

Proof in the trial revealed and the Court found that total income was $174,628,439 from the entire Kerlin field of which the Plaintiff owns 169.1/15,040ths.

Ethyl did not see fit to make proof of expenses in excess of the $75,021,000 shown by Exhibit 92, an exhibit prepared by Ethyl.

The Court notes that the proof showed that the total income from the commingled brine bearing bromine processed by Ethyl's plant near Magnolia was shown to the trial court by Ethyl's exhibit 93 as:

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Vinyl bromine	14,087.900
Sulphur	1,605.467
	174,628.439

After the case was completely tried and an equitable remedy announced, Ethyl now comes forward with its new calculation as shown by Exhibit D 104 reflecting a contention that only $125,775,000 in revenue came from the Kerlin field and that there was

a cost of $95,939,000 or a net profit of $29,836,000 of which 169.1/15,040ths is only $335,455; whereas the Court, using all available proof in the trial found the 169.1/15,040ths of the profit from the entire operation to be $1,119,922.24.

Ethyl is in the position of saying that it had all the proof available, chose not to reveal it and now says it is revealing the truth and asking that the judgment against it be reduced to $335,455.

When asked by the Court if Ethyl were offering $335,455 as a settlement figure, Ethyl frankly states that it was not, but that it planned an appeal and will contend that it owes merely royalty on the brine.

This Court is fully aware that Mr. Young is equally able to contend on appeal that the figures of Mr. Waddle, his very capable witness, showed damage of $16,000,000 or more to Mr. Young on bromine alone, Plaintiff's contention being that the brine bearing bromine was taken in great quantity from the Young land.

We are also aware that Plaintiff contends that Ethyl has never revealed all of its profit from Tetraethyl lead (the gasoline additive) or Ethyl Dibromide. Plaintiff also contends that $50,000 in law fees have been erroneously included in the costs and that over a million dollars in costs have been used by Ethyl and the Court as a "Know How" item on Exhibit 92.

But the Court was and is concerned with an equitable remedy and the total evidence does not persuade the Court that substantial justice has been denied to either party by the remedy set forth in the February 23, 1977 opinion of the Court.

At this point we quote from paragraph 16 of Ethyl's Rule 59 motion:

At the trial Ethyl did not offer evidence of the cost of producing any of its refined products during the year 1976 because all of the bromine rich brine beneath the Plaintiff's land had been displaced before the end of the year 1975. No evidence of any cost of producing ethylene dibromide and vinyl bromide was offered because Ethyl sincerely believed that the Court would not consider revenues derived from products refined in its Columbia County plant in making its determination as to Plaintiff's damages. The Plaintiff himself tried the case on the theory that he was entitled to damages based only on the values of elemental bromine and sulfur (Plaintiff's Exhibits 28 and 29), and Defendants' evidence of bromine values and costs of production was offered only to counter the inaccurate evidence produced by Plaintiff with respect to bromine values.

Additionally, Ethyl did not offer evidence as to the amount that brine purchased from ARCO contributed to its total "plant revenues" because, again, it genuinely believed that the Court would not consider all such "revenues" in arriving at its judgment.

The statement by Ethyl that it considered all the bromine rich brine beneath Mr. Young's land had been displaced before the end of 1975 was not a concession made on the record in the trial on the merits by Ethyl. Nor did Ethyl at that time concede the accuracy of the highly persuasive evidence of Paul R. Waddle, chief value witness for the Plaintiff.

This Court was aware of Mr. Waddle's evidence in the first trial. The Court was aware that Mr. Waddle very logically testified that exhibit 28 revealed that Ethyl had taken $6,584,134 worth of bromine and sulphur from Mr. Young's land. Exhibit 28 is as follows:

Amount and Value of Elemental Bromine and Sulphur Displaceable From J. M. Young Lands

Bromine-Bearing Brine Displaceable From J. M. Young Lands

Volume	12,836,816 Barrels
Bromine Recovery	2.1 Pounds per bbl.

Bromine Displaceable From J. M. Young Lands

Amount of Bromine	26,957,314 Pounds
Value of Bromine	$6,531,757

Sulphur Displaceable From J. M. Young Lands

Amount of Sulphur	5,076,736 Pounds
Value of Sulphur	$52,377

Total Value of Bromine and Sulphur Displaceable From J. M. Young Lands

$6,584,134

Exhibit 29 of Mr. Waddle's evidence concerning the total value of bromine and sulphur processed at the Magnolia (Columbia County) plant was and is as follows:

Amount and Value of Elemental Bromine and Sulphur Produced From Wells Directly Offsetting J. M. Young Lands From Start Up to 10-1-75 and to 11-1-76

	Offset Wells Nos. 18, 18-A & 23 As of 10-1-75	As of 11-1-76
Bromine-Bearing Brine Produced From Offset Wells		
Volume	32,855,957 Barrels	36,254,194 Barrels
Bromine recovery	68,997,510 Pounds	76,133,807 Pounds
Value of Bromine	$16,635,299	$18,447,221
Sulphur recovery	12,993,613 Pounds	14,337,523 Pounds
Value of Sulphur	$ 134,055	$ 147,920
Total Value of Bromine and Sulphur Produced From Offset Wells	$16,769,354	$18,595,141

All of this evidence was before the Court and was considered by the Court in arriving at a just, fair and equitable remedy for the trespass.

The Court was forced to use the Ethyl records from the Magnolia plant because that is where the commingled brine was taken and processed. Ethyl had not only the best records, but almost the only records both of income and cost.

Having the records kept at the Magnolia plant the Court used both the revealed income at the plant and the revealed costs at the plant.

Ethyl's motion position is one created by itself deliberately and with full advice of counsel.

Paragraph four of Defendant's Motion is an attack on the boundaries of Kerlin field as announced by the Court. We do not find the evidence under the Rule 59 Motion to over balance the evidence in the case in chief that the Kerlin field is actually 15,040 acres.

Paragraph five complains that 5.81% of brine came from outside the 15,040 acre Kerlin field. This fact together with all cost figures was considered, weighed and evaluated in the original opinion.

Paragraph six is an argument that has been covered in the above discussion concerning Defendant's Exhibit 104 and 109.

Paragraph seven is plaintiff's argument that the equitable remedy fashioned by the Court to fix a just and equitable relief is in reality a unitization of the Kerlin field. While the effect may be the same as is contended by plaintiff, we find that the judgment attacked is the Court's best effort to arrive at a fair, just and equitable remedy for the trespass committed. Admittedly it is innovative, but necessity requires it since never before have we had a case where salt water brine bearing bromine was taken by trespass and it became necessary to fix damages based on that type of trespass.

Paragraph eight is basically an argument that nothing except brine should be considered by the Court in fashioning a just remedy; or in the alternative, that nothing past bromine; and alternatively, no product except those produced by the Magnolia plant. All these arguments were considered by the Court and the Court determined it more fair, just and equitable to consider the total income at the Magnolia plant, the costs as shown by the evidence and to interpret the same so as to prevent Ethyl from making a prohibitive profit from its trespass.

Paragraph nine alleges a failure of the Court to apply Arkansas law. An examination of the Court's opinion reveals the

error of such contention. No theory offered by Ethyl ever attempts to provide a penalty against Ethyl for trespass and no theory of Ethyl makes any attempt to prevent a prohibitive profit to Ethyl. In fact it is patently Ethyl's position that it used its money and know how and it is entitled to all the profit it can amass.

Paragraph ten alleges Ethyl's position that it was entitled to commit the trespass and pay only a small royalty because Mr. Young was and is a man of modest means, unable financially to exploit the brine bearing bromine under his land. This Court dealt with that contention and deliberately refused to find as a fact the matters which Ethyl now states so positively to be the truth. At page 214 of our opinion we said:

> The Court refuses to find in this case that Mr. Young did not have the "desire" to develop the brine bearing minerals from his 169.1 acres and the Court finds that while it is "probable" that Mr. Young did not have the ability and the facilities to recover and treat his minerals, we refuse to make a specific finding to that effect since in this day and time when the value of such minerals is at a high level and the market more readily available, there is a distinct possibility that Mr. Young could have mined and developed his own minerals or leased to someone who actually had the ability and the facilities. We specifically find that the Defendant, Ethyl, as a trespasser, is not entitled to profit from its own wrongdoing.

We find no reason to depart from our previous finding.

[7] Paragraph eleven alleges that this Court misapplied Judge Miller's holding in the case of *National Lead Company v. Magnet Cove Barium Corp.*, 231 F.Supp. 208 (W.D.Ark.1964) and further states that Ethyl contends that valuation should stop at the bromine stage. Ethyl contends we are here dealing with compounds and that no law of Arkansas permits a court to

fashion an equitable remedy. We find that the law of this case as stated by the Court of Appeals is that this Court is required to fashion an equitable remedy based upon the facts of this case.

Paragraph twelve is another attempt to lower the total income of $174,628,439 to the figures shown by Exhibit 104 which was deliberately never placed in evidence by Ethyl in the trial of the case on its merits. We treated that contention in the discussion of paragraph three. We again point out that for all practical purposes Ethyl had control of all records and deliberately decided to use only the proof presented at the first trial. The evidence produced on the Rule 59 Motion is no more persuasive to the Court today than the evidence of Mr. Waddle that $16,000,000 was the damage to Mr. Young at the trial on its merits. But this Court after considering all the evidence announced its conclusion. We see no occasion to depart from that decision.

Paragraph 13 is a dissertation concerning the possibility that the Arkansas legislature would pass laws affecting the remedies available in this case. We judicially note that the Arkansas Legislature met and adjourned without taking such action.

Paragraph fourteen states that Ethyl does not make a determination of its Columbia County Brine field operation because most of the products manufactured in the Columbia County plant are "consumed internally." We considered at the trial and we now consider that the facts here alleged by Ethyl are at least one of the reasons this Court thought the compounds and total income from the field should be used rather than permitting Ethyl to make a prohibitive profit from its trespass. The entire opinion of the Court in the February 23, 1977 opinion is a full explanation of the Court's position based on all the evidence presented before the Court.

Paragraph fifteen is a statement of suggested actions which Ethyl contends would have a tendency to correct the alleged

errors of the Court. We have carefully considered each suggestion and find no reason to adopt any of the suggestions. Ethyl will be free to urge such contentions if and when it sees fit to perfect its appeal. The Plaintiff will be free to cross appeal and urge the theory explained by his witness, Mr. Waddle. This Court finds no reason to disturb its decision of February 23rd.

Paragraph 16 adds nothing to Ethyl's previous grounds alleged for a new trial or a reduced judgment except that Ethyl's Attorneys now state they thought the Court would not use such a method as it did to arrive at the conclusion it did. The only answer to such contention is that the Court was presented with the task of finding and announcing a just, fair and equitable remedy for the trespass committed by Ethyl against Mr. Young. The February 23rd opinion announced the Court's judgment in that regard.

Paragraph seventeen asked for oral argument and such argument has been heard and considered.

We specifically find that Ethyl's Motion should be denied. The Clerk will prepare the Order.

APPENDIX U

(District Court Memorandum Opinion)

United States District Court
Western District of Arkansas
El Dorado Division

J. M. Young, Plaintiff,

v. No. ED-72-6-C

Ethyl Corporation, et al., Defendants.

MEMORANDUM OPINION ON RULE 59 MOTION

(Filed September 13, 1977)

After an intensive and thorough trial this Court on February 23, 1977 rendered a written opinion finding that the defendant, Ethyl Corporation, should pay $1,119,922.24 to the plaintiff, J. M. Young for the continuing trespass against Mr. Young as damages up to July 1, 1976; and that each year thereafter Ethyl should make an accounting of its profits from the 15,040-acre Kerlin brine field and pay to Mr. Young, his assigns and successors 169.1/15,040ths of the net.

Immediately thereafter on or about March 4, 1977 Ethyl filed motion for new trial and amendment of judgment. Attached to its motion was the affidavit of Mr. Lloyd Andrew who had testified at the trial in chief.

This Court directed that complete discovery be made available and as a result thereof the deposition of Mr. Andrew was taken on July 12, 1977.

Hearing on the Rule 59 Motion was set for final presentation of evidence and argument on September 7, 1977 in the United States District Court room at El Dorado, Arkansas.

At that hearing the deposition of Mr. Andrew was introduced in evidence and in addition Mr. Andrew appeared in person and was examined and cross-examined.

At the conclusion of all evidence on the Rule 59 Motion the Court heard oral argument of the attorneys.

The Motion was taken under advisement and the same is now ready for decision.

In view of the objections made to introducing evidence on the Motion, we first discuss the applicability of Rule 59 to the situation and facts existing in this case and hold that the Defendant's motion and all evidence received thereon are properly before the Court at this time.

Rule 59 gives the trial judge power to prevent what he considers to be a miscarriage of justice if and when such a miscarriage is demonstrated. However, a court will not grant a new trial unless it is reasonably clear that prejudice or error has crept into the record or that substantial justice has not been done. Furthermore, the burden of showing harmful error rests on the party seeking the new trial.

In the case of *Call Carl, Inc. v. BP Oil Corporation,* 403 F. Supp. 568 at page 577 appears the following language:

> On a motion for a new trial under Fed. R. Civ. P.59, a verdict may be set aside and a new trial granted when a new trial would be in the interest of justice, *Aetna Casualty & Surety Co. v. Yeatts,* 122 F.2d 350, 352 (4th Cir. 1941). The burden of showing error at trial warranting a new trial rests on the party seeking a rehearing of the merits. 11 C.Wright and A. Miller, Federal Practice and Procedure, Civil § 2083, at 32 (1973).

Plaintiff's motion contains 17 paragraphs.

Paragraph one is a correct question from Rule 59.

Paragraph two states that the affidavit of Mr. Andrew is attached.

Paragraph three states that Ethyl agrees that the Court correctly found that Ethyl was a "good faith trespasser", but that the Court mistakenly applied the incorrect rule of damages and avers that the Court mismatched costs and revenues and omitted the cost items for the first six months of 1976.

The obvious answer to Ethyl's contention in this regard to call attention again to Exhibit 92 which reveals that no costs for 1976 are shown by that exhibit or any other evidence before the court at time of the trial in chief.

The Court notes that all evidence in the case was concluded by Ethyl without Ethyl offering any evidence as to costs for the first six months of 1976, and Ethyl's present contention reveals that it had the information in its hands and chose not to reveal it to the Court.

The Court further notes that Mr. Andrew, on questioning by the Court on September 7, 1977 stated that the costs of the first six months of 1976 could be used in the next yearly accounting and it could be done with no particular inconvenience or difficulty. He referred to Defendant Exhibit 109 and stated that said exhibit revealed the additional Bromine cost to be $8,565,000 for the first six months of 1976.

This information was no part of the proof before the Court when the case was decided. Ethyl, in its discretion saw fit not to make this information available to the Court when the Court was attempting to adjudge a fair and equitable remedy in damages for a trespass and the conversion of the materials acquired by reason of the trespass.

Ethyl freely stated that it offered no evidence of costs because it considered, and its theory was, that Mr. Young could recover only a royalty on the Brine bearing bromine that came from Mr. Young's land. Ethyl still contends the same thing.

The plaintiff, Mr. Young and the Court in fashioning an equitable remedy were and are almost totally reliant on the records of income and expense kept exclusively by Ethyl and disclosed by Ethyl reluctantly or when ordered by the Court to do so. We refer to that as a fact and not as a criticism since the Court recognizes that Ethyl is trying to make money by using its records and facilities to its own best interest.

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there was a cost of $95,939,000 or a net profit of $29,836,000 of which 169.1/15,040ths is only $335,455; whereas the Court, using all available proof in the trial found the 169.1/15,040ths of the profit from the entire operation to be $1,119,922.24.

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We are also aware that Plaintiff contends that Ethyl has never revealed all of its profit from Tetraethyl lead (the gasoline additive) or Ethyl Dibromide. Plaintiff also contends that $50,000 in law fees have been erroneously included in the costs and that over a million dollars in costs have been used by Ethyl and the Court as a "Know How" item on Exhibit 92.

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> At the trial Ethyl did not offer evidence of the cost of producing any of its refined products during the year 1976

because all of the bromine rich brine beneath the Plaintiff's land had been displaced before the end of the year 1975. No evidence of any cost of producing ethylene dibromide and vinyl bromide was offered because Ethyl sincerely believed that the Court would not consider revenues derived from products refined in its Columbia County plant in making its determination as to Plaintiff's damages. The Plaintiff himself tried the case on the theory that he was entitled to damages based only on the values of elemental bromine and sulfur (Plaintiff's Exhibit 28 and 29), and Defendants' evidence of bromine values and costs of production was offered only to counter the inaccurate evidence produced by Plaintiff with respect to bromine values.

Additionally, Ethyl did not offer evidence as to the amount that brine purchased from ARCO contributed to its total "plant revenues" because, again, it genuinely believed that the Court would not consider all such "revenues" in arriving at its judgment.

The statement by Ethyl that it considered all the bromine rich brine beneath Mr. Young's land had been displaced before the end of 1975 was not a concession made on the record in the trial on the merits by Ethyl. Nor did Ethyl at that time concede the accuracy of the highly persuasive evidence of Paul R. Waddle, chief value witness for the Plaintiff.

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All of this evidence was before the Court and was considered by the Court in arriving at a just, fair and equitable remedy for the trespass.

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Ethyl's motion position is one created by itself deliberately and with full advice of counsel.

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not find the evidence under the Rule 59 Motion to over balance the evidence in the case in chief that the Kerlin field is actually 15,040 acres.

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Paragraph six is an argument that has been covered in the above discussion concerning Defendant's Exhibit 104 and 109.

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> The Court refuses to find in this case that Mr. Young did not have the "desire" to develop the brine bearing minerals from his 169.1 acres and the Court finds that while it is "probable" that Mr. Young did not have the ability and the facilities to recover and treat his minerals, we refuse to make a specific finding to that effect since in this day and time when the valus of such minerals is at a high level and the market more readily available, there is a distinct possibility that Mr. Young could have mined and developed his own minerals or leased to someone who actually had the ability and the facilities. We specifically find that the Defendant, Ethyl, as a trespasser, is not entitled to profit from its own wrongdoing.

We find no reason to depart from our previous finding.

Paragraph eleven alleges that this Court misapplied Judge Miller's holding in the case of *National Lead Company v. Magnet Cove Barium Corp.*, 231 F. Supp. 208, and further states that Ethyl contends that valuation should stop at the bromine stage. Ethyl contends we are here dealing with compounds and that no law of Arkansas permits a court to fashion an equitable remedy. We find that the law of this case as stated by the Court of Appeals is that this Court is required to fashion an equitable remedy based upon the facts of this case.

Paragraph twelve is another attempt to lower the total income of $174,628,439 to the figures shown by Exhibit 104 which was deliberately never placed in evidence by Ethyl in the trial of the case on its merits. We treated that contention in the discussion of paragraph three. We again point out that for all practical purposes Ethyl had control of all records and deliberately decided to use only the proof presented at the first trial. The evidence produced on the Rule 59 Motion is no more persuasive to the Court today than the evidence of Mr. Waddle that $16,000,000 was the damage to Mr. Young at the trial on its merits. But this Court after considering all the evidence announced its conclusion. We see no occasion to depart from that decision.

Paragraph 13 is a dissertation concerning the possibility that the Arkansas legislature would pass laws affecting the remedies available in this case. We judicially note that the Arkansas Legislature met and adjourned without taking such action.

Paragraph fourteen states that Ethyl does not make a determination of its Columbia County Brine field operation because most of the products manufactured in the Columbia County plant are "consumed internally." We considered at the trial and we now consider that the facts here alleged by Ethyl are at least one of the reasons this Court thought the compounds and total income from the field should be used rather than permitting Ethyl to make a prohibitive profit from its trespass. The entire opinion of the Court in the February 23, 1977 opinion is a full explanation of the Court's position based on all the evidence presented before the Court.

Paragraph fifteen is a statement of suggested actions which Ethyl contends would have a tendency to correct the alleged errors of the Court. We have carefully considered each suggestion and find no reason to adopt any of the suggestions. Ethyl will be free to urge such contentions if and when it sees fit to

perfect its appeal. The Plaintiff will be free to cross appeal and urge the theory explained by his witness, Mr. Waddle. This Court finds no reason to disturb its decision on February 23rd.

Paragraph 16 adds nothing to Ethyl's previous grounds alleged for a new trial or a reduced judgment except that Ethyl's Attorneys now state they thought the Court would not use such a method as it did to arrive at the conclusion it did. The only answer to such contention is that the Court was presented with the task of finding and announcing a just, fair and equitable remedy for the trespass committed by Ethyl against Mr. Young. The February 23rd opinion announced the Court's judgment in that regard.

Paragraph seventeen asked for oral argument and such argument has been heard and considered.

We specifically find that Ethyl's Motion should be denied. The Clerk will prepare the Order.

Dated: September 13, 1977.

/s/ PAUL X WILLIAMS
PAUL X WILLIAMS

APPENDIX V

(Order Dismissing Motion for New Trial)

United States District Court Western District of Arkansas
El Dorado Division

No. ED-72-c-6

J. M. Young Plaintiff)

v.

Ethyl Corporation Defendant)

Order dismissing Motion for New Trial and denying request for amendment of judgment.

(Filed September 13, 1977)

On this September 13, 1977 the court filed in the above styled case its memorandum opinion directing that the pending rule 59 motion be dismissed, that motion for new trial be denied and request for amendment of judgment be denied.

In accord with said opinion it is hereby ordered and adjudged that the Rule 59 motion be dismissed, that the motion of Ethyl for a new trial and for amendment of the judgment be and the same is hereby denied.

Sept. 13, 1977.

PAUL X WILLIAMS, U. S. District Judge

APPENDIX W

(Exhibit C of the Complaint, Also Plaintiff's Exhibit 2, Also Plaintiff's Exhibit C and Also Defendant's Exhibit 6)

OIL AND GAS LEASE

.....

.....

TO

.....

.....

Date.....

Number of Acres.....

Term.....

County.....

STATE OF ARKANSAS }
County of ..... } ss.

This instrument was filed for record on the ..... day of ....., A.D., 19.... at ..... o'clock .... M., and duly recorded in Book ....., on Page .....

.....

Circuit Clerk and Recorder

By .....

Deputy Clerk

Ark. Form 88⅛ OIL, GAS AND MINERAL LEASE (⅛ Gas)
with Relinquishment of Dower and Homestead

THIS AGREEMENT entered into on this the ..... day of ....., 19....., by and between .....
.....
.....,
hereinafter called "Lessor," whether one or more, and ....., hereinafter called "Lessee," WITNESSETH:

Article 1. Lessor, for and in consideration of the sum of $25.00, cash in hand paid, and other valuable consideration, the receipt of which is hereby acknowledged, and the covenants and agreements of Lessee hereinafter contained, ha..... granted, demised, leased and let, and by these presents do ....., grant, demise, lease and let exclusively unto Lessee, for the purpose of drilling, mining and operating for the production of oil, gas, distillate, and other minerals, whether similar or dissimilar, including, but not limited to, the right to produce or remove salt water and its contents by drilling, pumping, drainage, injection, forced subterranean movement, or by other means, the following described land in ..... County, Arkansas:

together with any land contiguous thereto title to which Lessor, or any one of those called Lessor, has acquired by adverse possession, all of which lands, for all purposes of this agreement, shall be deemed to contain ..... acres of land whether the land hereinbefore mentioned contains more or less than that number of acres.

Article 2. This lease, subject to the right of Lessee to cancel and surrender it insofar as it covers all or any part of the above mentioned land as hereinafter provided, shall remain in full

force and effect for a term of ten years from the date hereinbefore first written and as long thereafter as the annual payments specified in sub-section (e) of Article 3 and the provisions of Article 3, which follow sub-section (e) of Article 3, are continued to be made.

Article 3. As additional consideration for this lease, Lessee shall: (a) deliver to the credit of Lessor, free of cost, in tanks or pipe line to which a well on the leased premises is connected, the equal one-eighth part of all oil or distillate produced and saved from the leased premises; (b) pay to Lessor for gas from each well where gas only is found, one-eighth of the gross proceeds thereof at the prevailing market price for all gas sold or used off the premises, payments to be made from time to time, at the election of Lessee, but not less frequently than at the end of each three calendar months subsequent to the date upon which such gas is first sold or so used; (c) pay to Lessor for gas produced from any oil or distillate well and sold or used off the premises or for the manufacture of casinghead gasoline, one-eighth of the gross proceeds thereof at the prevailing market price for the gas so sold or used, payments to be made from time to time, at the election of Lessee, but not less frequently than at the end of each three calendar months subsequent to the date upon which such gas is first sold or so used; (d) pay to Lessor for any other mineral, excepting salt water or any or all mineral contained in salt water, produced and saved from the leased premises, one-tenth of the market value thereof at the well or mine; (e) pay to Lessor, on or before each of the first through the ninth anniversary dates of this lease, a sum to be ascertained by multiplying the number of acres stated in the foregoing Article 1 by One Dollar, and, on or before each anniversary date of the existence of this lease thereafter, pay to Lessor a sum to be ascertained by multiplying the number of acres stated in the foregoing Article 1 of this lease by Ten Dollars, provided, however, that, if, more than sixty days prior

to any such payment to be made on or before the first through the ninth anniversary dates of this lease, Lessee, or its assigns, is engaged in the production of salt water from any producing well, as distinguished from an injection well, located within two miles of the land covered by this lease, which salt water is not produced incidental to the production of oil, gas or distillate, nor in the testing of the capacity of a well to produce salt water, each succeeding payment to be made on or before the first through the ninth anniversary dates of this lease shall be increased from One Dollar per acre to Ten Dollars per acre; provided, however, that if Lessor owns a less interest in the land covered by this lease than the entire and undivided fee simple mineral estate therein, then each payment to be made under the foregoing provisions of this Article shall be paid to Lessor only in the proportion which the fee simple interest in the minerals under the land owned by Lessor bears to the whole and undivided fee simple mineral estate in that land. If Lessor owns a different interest in the fee simple estate in the minerals under any part of the land covered by this lease than is owned by Lessor in any of the remainder of said land, for the purpose of reducing the payments to be made under this Article 3, and for that purpose only, that particular part shall be considered separately from the remainder of the land covered by this lease.

If the mineral interest of any person named as Lessor in the minerals under the land covered by this lease has heretofore been reduced by the conveyance of a nonparticipating mineral interest, or nonparticipating royalty interest by him, or by his predecessor in title, each payment to be made under the provisions of this Article 3 to that particular person shall be reduced proportionately. Any such sum so deducted from the payment to be made to the particular person involved shall be paid to the owner or owners of the nonparticipating mineral interest, or nonparticipating royalty interest, which has caused such reduction. Each owner or such nonparticipating mineral interest, or nonpar-

ticipating royalty interest, executing this agreement, or a counterpart thereof, agrees to accept such payment in lieu of royalty on salt water produced or removed from the land covered by this lease and in satisfaction of damages, if any, which he may sustain by drainage or removal of salt water from the land covered by this lease.

In lieu of making any payment to Lessor under the provisions of the foregoing sub-section 3(e), and the provisions of Article 3 which follow sub-section (e) of this Article 3, Lessee may deposit to the credit of Lessor in .... at .... the sum so payable, which shall, for all purposes of this lease, be considered to be a payment to Lessor. If at the time of such deposit any person hereinbefore named as Lessor is dead or is an incompetent, such deposit in the name of the deceased or the incompetent shall, for all purposes, be binding upon the heirs, devisees, executor or administrator of the deceased or upon such incompetent or the guardian of the person or of the estate of the incompetent. Should the bank named, or any depository subsequently named by Lessor, fail or liquidate, or if it should for any reason fail or refuse to accept the check or draft of Lessee tendered in payment of any sum payable under the provisions of sub-section (e) and the provisions which follow sub-section (e) of this Article 3, the attempted payment in the manner hereinbefore provided shall not thereby be rendered ineffective, nor shall Lessee be in default for failure to pay the sum involved until thirty days after a Lessor shall have furnished to Lessee a recordable instrument naming a new depository. The failure to pay any such sum so due shall not give Lessor the right to cancel this lease as to any lands covered by this lease, but shall only entitle the Lessor to recover from Lessee the sum so due.

Lessee, or any assignee or sub-lessee, may at any time, and from time to time, execute and file for record in said county,

a release of this land insofar as it affects all or any part or parts of the lands covered by this lease, and thereby be relieved, as to the land with respect to which this lease has been released, of any and all obligations of this lease not then accrued. Upon such filing of any such release, each payment to be made in accordance with sub-section (e) and the provisions which follow sub-section (e) of this Article 3 to be made thereafter with respect to land which remains covered by this lease shall be reduced in the same proportion as the number of acres of land as to which this lease has been released bears to the total number of acres stated in the foregoing Article 1.

Article 4. Lessee shall have the right to use, free of cost, oil, gas or distillate and fresh water produced from the leased premises, excepting water produced from a well of Lessor, for any of the operations of Lessee on the leased premises, the quantity of oil, gas or distillate so used shall be deducted from the total quantities produced for the purpose of computing the payments as provided in Article 3.

Article 5. No royalty or payment, other than the payment provided in sub-section (e) of Article 3 and the provisions which follow sub-section (e) of Article 3, shall be payable by Lessee to Lessor with respect to salt water produced or removed from the leased premises or with respect to any product or products extracted from the salt water by Lessee, or with respect to salt water produced from the leased premises and sold by Lessee, nor shall Lessee in any event be liable to Lessor for failure to protect the leased premises from drainage or removal of salt water and its contents. The sums payable to Lessor under the provisions of sub-sections (e) and the provisions which follow sub-section (e) of the foregoing Article 3 are to be made by Lessee in lieu of any royalty with respect to salt water produced or removed from the leased premises and any product or products extracted from the salt water and in complete compensation for any drainage or removal of salt water from the land hereinbefore mentioned.

Article 6. Lessee shall have the right to drill, complete, recomplete, deepen and operate a well or wells for the production of salt water from any horizon under the lands covered by this lease, or for the injection of salt water produced by Lessee from lands covered by this lease or from any other land into any horizon which lies below the depth of 4,000 feet subsurface under the lands covered by this lease.

Article 7. If at any time while this lease is in force and effect, Lessee deems it advisable and expedient to form a drilling unit for the drilling of a well in search of oil or gas, to conform with regular or special spacing rules issued by any State or Federal agency, or in order to conform to the conditions imposed upon the issuance of a permit to drill that well, or in order to obtain the largest allowable daily production of oil and/or gas for that well, Lessee is hereby granted the right to pool, unitize and combine the land covered by this lease, or any part thereof, with other land, lease or leases in the immediate vicinity thereor, whether the land, lease or leases is or are held by Lessee or another or others, provided that any drilling unit created thereby shall not exceed the number of acres allocable to the well involved by the applicable rule or regulation of the State or Federal agency involved. If production of oil, gas or distillate is had on a drilling unit so unitized, such production shall be treated as production from land affected by this lease, whether or not the well be located on lands covered by this lease, and each royalty payable on oil, gas or distillate produced from the drilling unit involved shall be reduced in the same proportion as the number of acres covered by the part of this lease contributed to the unitized drilling unit bears to the total number of acres in that particular drilling unit. In event of the creation of such a drilling unit, Lessee shall execute and file for record in said county and state, an instrument identifying the pooled acreage.

Article 8. Lessee shall have the right to construct, erect, maintain, replace and use on the land mentioned in the foregoing

Article 1 all storage tanks, separators, pipelines, buildings, pumps, shafts, hoists, machinery, boilers, engines, electric lines, telephone and telegraph lines, roads, bridges, and other equipment reasonably necessary for conducting, on the land covered by this lease, operations hereunder of any nature whatsoever. Lessee shall have the right to remove all equipment, materials and supplies placed upon the leased premises at any time while this lease is in effect as to the land on which such material, equipment and supplies are located, or within a period of two years after this lease has terminated for any reason with respect to the land on which such material, equipment and supplies is or are located. Lessor grants to Lessee the right to lay, maintain, repair and replace, from time to time upon the land covered by this lease a pipeline or pipe lines for the purpose of transporting salt water onto and across the land covered by this lease.

When requested by Lessor in writing, Lessee shall bury any pipeline below plow depth. Lessee shall pay Lessor for damages to timber and growing crops on the leased premises caused by operations of Lessee.

Notwithstanding any other provision of this Article 8, Lessee shall not drill any well or construct any structure, other than a pipeline, within 200 feet of any dwelling house now upon land affected by this lease.

Article 9. If the estate or either party hereto is assigned or sublet, and the privilege of assigning or subletting in whole or in part is expressly allowed, the covenants hereof shall extend to the sub-lessees, successors and assigns of the parties; and in the event of an assignment or subletting by Lessee, Lessee shall be relieved and discharged as to the leasehold rights so assigned or sublet from any liability to Lessor thereafter accruing upon any of the covenants or conditions of this lease. No change in the ownership of the lands or mineral interests covered by this lease or in the ownership of any royalty, however

accomplished, shall operate to enlarge the obligations or diminish the rights of Lessee or require separate measuring or installation of separate measuring tanks by Lessee. Notwithstanding any actual or constructive knowledge of or notice to Lessee, no change in the ownership of land, or of any mineral interest, covered by this lease, or of the right to receive any payment to be made under the foregoing Article 3, or of any interest therein, by reason of death, or conveyance, or in any other manner, shall be binding on Lessee until ninety days after Lessee has been furnished written notice thereof, together with the original or certified copies of all documents and affidavits necessary to establish the change in ownership involved.

Lessor hereby warrants and agrees to defend the title to the lands covered by this lease, but if the interest of Lessor covered by this lease is expressly stated to be less than the entire fee simple mineral estate, Lessor's warranty shall be limited to the interest so stated. Lessee may purchase or lease the rights of any person claiming any interest in the land covered by this lease and exercise such rights as may be obtained thereby and Lessee shall not suffer any forfeiture nor incur any liability to Lessor by reason thereof. Lessee shall have the right at any time to pay for Lessor, taxes or any indebtedness secured by a mortgage or other lien on said lands, in the event of default of payment by Lessor, and be subrogated to the rights of the holder thereof. Any such payment made by Lessee for Lessor may be deducted from any amounts of money which may become due Lessor under this lease.

Article 10. So long as each annual payment which the Lessee is obligated to make in accordance with sub-section (e) and the provisions of Article 3 which follow sub-section (e) of the foregoing Article 3 is made by Lessee, or a successor, assignee or sub-lessee of Lessee, neither Lessee nor the successor, assignee or sub-lessee of Lessee shall be obligated, either expressly or impliedly, to drill or operate on land covered by this lease any

well for the production of oil, gas, distillate, salt water or other mineral or for the injection of salt water into land covered by this lease.

Article 11. This lease and all provisions thereof shall be applicable to and binding upon the parties and their respective heirs, successors and assigns. If any one or more of the persons named as Lessor does or do not execute this lease, it shall nevertheless be binding upon each of the persons executing it.

Article 12. For the same consideration mentioned in Article 1, the wife of each individual executing this lease, who is married, joins with her husband in the execution of this agreement, and releases and relinquishes unto Lessee all of her right of dower and homestead in and to the property of her husband which is transferred, conveyed or affected by this lease.

IN WITNESS WHEREOF, this instrument is executed as of the date hereinbefore first mentioned, which date shall be the basis for ascertaining the first and each succeeding anniversary date of the execution of this lease.

.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

EXHIBIT "2-A"

Acknowledgment for Husband and Wife

STATE OF.....
COUNTY OF.....

BE IT REMEMBERED, that on this day came in person before me, the undersigned, a Notary Public within and for the

County and State aforesaid, duly commissioned and acting, ..., to me well known as the person whose name is subscribed to the foregoing instrument of writing, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth.

And, on the same day, also voluntarily appeared before me ....., wife of the said ....., to me well known, and, in the absence of her husband, declared that she had, of her own free will, executed said instrument, and signed and sealed the relinquishment of dower and of homestead in the foregoing instrument of writing for the consideration and purposes therein contained and set forth, without compulsion or undue influence of her said husband.

WITNESS MY HAND AND SEAL as such Notary Public on this the ..... day of ....., 19.....
My commission expires:

.....

.....
Notary Public

Acknowledgment for a Single Person or Married Woman

STATE OF.....
COUNTY OF.....

BE IT REMEMBERED, that on this day came in person before me, the undersigned, a Notary Public within and for the County and State aforesaid, duly commissioned and acting, ..., to me well known as the person whose name is subscribed to the foregoing instrument, and stated that he/she had executed the same for the consideration and purposes therein mentioned and set forth.

WITNESS MY HAND AND SEAL as such Notary Public on this the ..... day of ....., 19.....
My commission expires:

.....

.....
Notary Public

Acknowledgment for Corporation

STATE OF.....
COUNTY OF.....

On this day, before me, a Notary Public within and for the County and State aforesaid, duly commissioned, qualified and acting, appeared in person the within named .... and ....., to me personally well known, who stated they were the .... and ..... of ....., a corporation, and were duly authorized in their respective capacities to execute the foregoing instrument for and in the name and behalf of said corporation, and further stated and acknowledged that they had so signed, executed and delivered said foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal on this the ..... day of ....., 19.....

My commission expires:

.....

.....
Notary Public

Acknowledgment for Husband and Wife

STATE OF.....
COUNTY OF.....

BE IT REMEMBERED, that on this day came in person before me, the undersigned, a Notary Public within and for the County and State aforesaid, duly commissioned and acting, ..., to me well known as the person whose name is subscribed to the foregoing instrument of writing, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth.

And, on the same day, also voluntarily appeared before me ....., wife of the said ....., to me well known, and, in the absence of her husband, declared that she had, of her own free will, executed said instrument, and signed and sealed the relinquishment of dower and of homestead in the foregoing instrument of writing for the consideration and purposes therein contained and set forth, without compulsion or undue influence of her said husband.

WITNESS MY HAND AND SEAL as such Notary Public on this the ..... day of ....., 19.....

My commission expires:

.....
Notary Public

Acknowledgment for a Single Person or Married Woman

STATE OF.....
COUNTY OF.....

BE IT REMEMBERED, that on this day came in person before me, the undersigned, a Notary Public within and for the County and State aforesaid, duly commissioned and acting

....., to me well known as the person whose name is subscribed to the foregoing instrument, and stated that he/she had executed the same for the consideration and purposes therein mentioned and set forth.

WITNESS MY HAND AND SEAL as such Notary Public on this the ..... day of ....., 19.....

My commission expries:

.....

.....
Notary Public

Acknowledgment for Husband and Wife

STATE OF.....
COUNTY OF.....

BE IT REMEMBERED, that on this day came in person before me, the undersigned, a Notary Public within and for the County and State aforesaid, duly commissioned and acting, ..., to me well known as the person whose name is subscribed to the foregoing instrument of writing, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth.

And, on the same day, also voluntarily appeared before me ....., wife of the said ....., to me well known, and, in the absence of her husband, declared that she had, of her own free will, executed said instrument, and signed and sealed the relinquishment of dower and of homestead in the foregoing instrument of writing for the consideration and purposes therein contained and set forth, without compulsion or undue influence of her said husband.

WITNESS MY HAND AND SEAL as such Notary Public on this the.....day of ..... 19.....

.....
Notary Public

My commission expires:

.....

Acknowledgment for a Single Person or Married Woman

STATE OF.....
COUNTY OF.....

BE IT REMEMBERED, that on this day came in person before me, the undersigned, a Notary Public within and for the County and State aforesaid, duly commissioned and acting, ..., to me well known as the person whose name is subscribed to the foregoing instrument, and stated that he/she had executed the same for the consideration and purposes therein mentioned and set forth.

WITNESS MY HAND AND SEAL as such Notary Public on this the.....day of ..... 19.....

.....
Notary Public

My commission expires:

.....

STATE OF ARKANSAS }
Couny of.....} ss.

CERTIFICATE OF RECORD

I, ..., Circuit Clerk and Ex Officio Recorder for the county aforesaid, do hereby certify

that the annexed and foregoing Oil and Gas Lease was filed for record in my office on the ..... day of ..... A.D., 19...., at .....o'clock.....M., and the same is now duly recorded, with the acknowledgments and certificates thereon, in "Record Book ....," Page.....

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court, this.....day of....., 19.....

.....
Circuit Clerk and Ex Officio Recorder

By ....., D.C.

Supreme Court, U. S.
FILED
DEC 6 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978
No. 78-751

J. M. YOUNG,
Petitioner,

v.

ETHYL CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR ETHYL CORPORATION IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978
No. 78-751

J. M. YOUNG,

Petitioner,

v.

ETHYL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR ETHYL CORPORATION IN OPPOSITION

Ethyl Corporation, Respondent, opposes the Petition for Writ of Certiorari of J. M. Young, Petitioner, as follows:

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals conflicts with the law of Arkansas.

2. Whether the decision of the Court of Appeals conflicts with a decision of another Court of Appeals on the same matter.

STATEMENT

This case, which involves only a question of Arkansas property law, has been the subject of two trials and two appeals. In his complaint Petitioner invoked the jurisdiction of the federal courts under the statute providing for

federal jurisdiction when there is diversity of citizenship between the parties. There are no federal questions involved. Petitioner has never challenged the determinations made by each of the trial courts and the two panels of the Court of Appeals that the resolution of the dispute is to be governed by the law of the State of Arkansas.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Court of Appeals correctly applied well established principles of Arkansas law in reversing the damage award of the trial court and remanding the case for a correct determination of Petitioner's damages under the law of that State.

2. The decision of the Court of Appeals does not conflict with any decision of any other Court of Appeals.

3. The decision of the Court of Appeals does not conflict with any decision of any state court.

ARGUMENT

I.

The Court of Appeals correctly applied well established principles of Arkansas law in reversing the damage award of the trial court and remanding the case for a correct determination of Petitioner's damages under the law of that State

The decisions of the lower courts in connection with each of the two prior trials and appeals make it abundantly clear that this is a case which involves a mineral trespass.*

* Brine, the substance removed from beneath Petitioner's land, is, by Arkansas statute, a mineral. *Ark. Stat. Ann.* § 52-201 (1971).

Contrary to Petitioner's baseless assertions, he has not been denied a recovery of damages. The Court below has straightforwardly held that Petitioner should be awarded damages based on findings of fact made by the trial court grounded upon clear and convincing evidence and the Arkansas law applicable to those facts.

A.

Respondent's Trespass was a Trespass "In Good Faith"

The pivotal issue of fact in connection with the measure of damages in any mineral trespass case is whether the trespass was one engaged in "in good faith" (innocent) or whether it was committed "in bad faith" (willful). The trial court here, on the basis of overwhelming evidence, found as a fact that Respondent's trespass was a trespass "in good faith".

Petitioner's blatantly misleading characterizations of the trial court's fact findings clearly demonstrate the futility of his position. Even in the face of unequivocal findings of fact to the contrary, he continues to urge, as he did in the Court of Appeals, that the trial court found that Respondent was a "bad faith" trespasser and that his damages should be based on such a finding.

The trial court's finding on the crucial fact issue concerning the nature of Respondent's trespass is, *in toto*, as follows:

> "In 1975 the Court of Appeals for the Eighth Circuit declared and it is the law of this case that Defendant's action was a trespass and that valuable minerals were taken. The trespass was an act done deliberately by very smart and able operators who intended to and skillfully did exactly what they deliberately planned to do, which was to remove brine bearing bromine and other valuable minerals from the Smackover formation under the lands belonging to J. M. Young.

> "At the same time we find that the motive of the defendant, Ethyl, was based on a sincere belief it had a legal right to do what it was doing.
>
> "Judge Harris's opinion reported in 382 F.Supp. 769 is enough alone to show conclusively that, in law, the trespass was in good faith.
>
> "In the case at bar we have also the written opinion of both Texas and Arkansas attorneys, well advised in such matters and completely able in the oil and gas legal business, who advised the defendant that its course of action was legal. The evidence heavily preponderates to a finding that the action of the defendant was 'in good faith'.
>
> "The Court specifically finds and holds in this case that the trespass of Ethyl was an 'in good faith' trespass as that term is used in describing trespass and remedies for trespass." (Petition, A-95)

A trespasser who acts on the basis of advice rendered by a competent attorney is a good faith trespasser. *Mason* v. *United States,* 260 U.S. 545 (1923); *Delta Drilling Co.* v. *Arnett,* 186 F.2d 481 (6th Cir. 1950), *cert. denied,* 340 U.S. 954 (1951); *Daly* v. *Smith,* 220 Cal. App. 2d 592, 33 Cal. Rptr. 920 (1963); *Swiss Oil Corp.* v. *Hupp,* 253 Ky. 552, 69 S.W.2d 1037 (1934); *Cooke* v. *Gulf Refining Co.,* 135 La. 609, 65 So. 758 (1914); *Robinson* v. *Gordon Oil Co.,* 266 Mich. 65, 253 N.W. 218 (1934); *Dilworth* v. *Fortier,* 405 P.2d 38 (Okla. 1964). Indeed, reliance on the advice of counsel is considered competent evidence of good faith even though the attorney may have an interest in the profits derived from the trespass. *Daly* v. *Smith, supra.* It is significant here that in the two of the above-cited decisions the advice of counsel was premised upon an unsettled legal question. *Dilworth* v. *Fortier, supra; Delta Drilling Co.* v. *Arnett, supra.*

The questions of whether a mineral trespass is "willful" (bath faith) or "innocent" (good faith) is an issue of fact to be determined by the trier thereof. *Mason* v. *United States,* 260 U.S. 545, 556 (1923); *Central Coal & Coke Co.* v. *Penny,* 173 F. 340 (8th Cir. 1909); *Daly* v. *Smith,* 220 Cal. App. 2d 592, 33 Cal. Rptr. 920, 924 (1963); *Zugar* v. *Crystal Springs Bleachery,* 71 Ga. App. 821, 32 S.E.2d 414, 416 (1944); *Bowman* v. *Hibbard,* 257 S.W.2d 550, 552 (Ky. 1952); *Sandlin* v. *Webb,* 240 S.W.2d 69, 70 (Ky. 1951); *Griffith* v. *Clark Manufacturing Co.,* 212 Ky. 498, 279 S.W. 971 (1926); *Elk Garden Big Vein Mining Co.* v. *Gerstell,* 100 W. Va. 472, 131 S.E. 152, 154 (1926); *Pan Coal Co.* v. *Garland Pocahontas Coal Co.,* 97 W. Va. 368, 125 S.E. 226, 233 (1924).

Rule 52(a), *Federal Rules of Civil Procedure,* the rule relating to findings by the court, specifically provides:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . ."

Here the trial court, after hearing all of the testimony, had ample opportunity to judge the credibility of all of the witnesses. His finding that Respondent's trespass was a trespass "in good faith" was correctly upheld by the Court of Appeals.

B.
The Measure of Damage to be Applied Under Arkansas Law Must Be Determined on the Basis of the Value of Petitioner's Brine as it was when Originally in Place in the Ground

The law of Arkansas with respect to the measure of damages for good faith mineral trespasses has been settled

since 1925 when the Supreme Court, in *Ward* v. *Spadra Coal Co.*, 168 Ark. 853, 272 S.W. 353 (1925), held:

> "The measure of damages in an action for unlawfully extracting ore from the premises of another depends upon whether the invasion of the premises was through inadvertence, or honest mistake, or was willful. *If the trespass is the result of an honest mistake, the defendant is compelled to pay only the value of the ore as it was when originally in place in the ground.*" (272 S.W. at 354) (Emphasis added).

Other Arkansas state and federal courts have consistently followed this rule. *Central Coal & Coke Co.* v. *Penny*, 173 F. 340 (8th Cir. 1909) *National Lead Co.* v. *Magnet Cove Barium Corp.*, 231 F. Supp. 208 (W.D. Ark. 1964); *Arkansas Power & Light Co.* v. *Decker*, 179 Ark. 592, 17 S.W.2d 293 (Ark. 1929); *Jewel Coal & Mining Co.* v. *Watson*, 176 Ark. 108, 2 S.W.2d 58 (1928); *McGraw* v. *Berry*, 170 Ark. 426, 280 S.W. 383 (1926).

C.
Under Arkansas Law the Value of Petitioner's Brine in Place is the Royalty Value Thereof

The law of Arkansas with respect to the measure of the value of a mineral in place was established by the Supreme Court in *Ward* v. *Spadra Coal Co.*, 168 Ark. 853, 272 S.W. 353 (1925). There, the court, after concluding that the trespass involved was undertaken in good faith, announced the Arkansas rule that the measure of the in place value of a mineral mined as a result of such a trespass is the royalty value thereof, as follows:

> "... The evidence in the record tends to show that the royalty usually paid in that locality for mining coal where the machinery and equipment was not considered was 10 cents for slack coal, and 15 cents for hard coal. This evidence is not disputed and should have been taken by the chancellor in fixing the value of the coal taken." (272 S.W. at 355)

The rule announced by *Ward* was reaffirmed in *McGraw* v. *Berry*, 170 Ark. 426, 280 S.W. 383 (1926). In that case, after finding that the defendant was a good faith trespasser, the court held that the in place value of the mineral taken was the royalty value thereof.

In a more recent decision, *Dinwiddie Construction Co.* v. *Campbell*, 81 Nev. 469, 406 P.2d 294, 297 (1965), the Nevada Supreme Court recognized that Arkansas is one of the jurisdictions which adheres to the royalty value test for awarding damages in cases involving good faith mineral trespasses.

National Lead Co. v. *Magnet Cove Barium Corp.*, 231 F. Supp. 208 (W.D. Ark. 1964), succinctly summarizes the Arkansas law with respect to damages to be awarded in cases involving good faith mineral trespasses. There the court recognized the long settled law of that state as it applies to the measure of damages to be assessed against a good faith mineral trespasser, as follows:

> "The court is also of the opinion that the proper measure of damages is *under the Arkansas law* the in-place value for the ore removed and disturbed because of an innocent or non-wilful trespass.... *As to a landowner who has not the opportunity nor the equipment to develop minerals, the amount for which he can lease them, or royalty value, is the generally accepted measure of damages as to him for an innocent trespass and conversion of minerals.*" (231 F.Supp. at 221) (Emphasis added).

In *National Lead* the party against whom the good faith trespass was committed was a corporate "mining lessee"

which had the know-how, opportunity and equipment to mine its minerals. In addition, the plaintiff there, unlike Petitioner here, owned a manufacturing facility in which to process the mineral involved. For those reasons alone did the court permit a recovery based on the enhanced value of the ore taken less the cost of the mining thereof. In that regard, the court said:

> "Thus, the court is of the opinion that the in-place value *as to a mining lessee, such as the plaintiff here,* is the enhanced value of the ore with a credit to a non-wilful trespasser for its costs. *By this approach the plaintiff mineral lessee is put in the place it would have been had it not been deprived of the opportunity of mining its ore,* while at the same time depriving the trespasser of any profit from its wrongdoing, but yet inflicting no punishment on the trespasser by the allowance of its expenses or costs in removing and developing the ore." (231 F.Supp. at 221) (Emphasis added).

Here the evidence is undisputed that Petitioner is not, and indeed could never be, a "mining lessee" within the meaning of the holding of the court in *National Lead.* He is an individual whose background is limited to farming. He has had no background or training in either the highly technical business of producing brine or the building of sophisticated chemical plants to convert that mineral into chemical compounds in a complicated manufacturing process. Petitioner's own testimony in this respect was conclusive. The testimony of his son-in-law is likewise decisive on this issue, as follows:

> "Q. How long have you known Mr. Young, Dr. Ziemer?
>
> "A. About ten years, and some few months.
>
> "Q. And you are his son-in-law, I believe the record has established?
>
> "A. Yes, sir.

> "Q. Based on your acquaintenance with Mr. Young, and being his son-in-law, do you know whether or not he has ever engaged in any occupation other than that of farming?
>
> "A. I believe just occupations related to farming, like cotton gin, or something like that.
>
> "Q. So far as you know has he ever been engaged in any manufacturing operations of any kind?
>
> "A. No, sir, not to my knowledge.
>
> "Q. Do you have any knowledge of whether or not he has any technical training or know-how which would permit him to feasibly build and operate a bromine extraction plant?
>
> "A. I don't think he has such training.
>
> "Q. Do you know whether or not he has any training or background or experience which would permit him to undertake his own venture whereby he would venture the extraction of brine from a reservoir for the production of bromine?
>
> "A. Not on his own I don't believe. He would not have all the necessary qualifications."

The uncontradicted evidence compels the conclusion of the Court of Appeals that under no circumstances could Petitioner have profitably developed the brine underlying his 169.1 acre tract. (Petition, A-4 and A-5).

On the basis of an abundance of evidence concerning sales of brine in south Arkansas, the trial court found that the value of the brine removed from beneath Petitioner's land as a result of Respondent's good faith trespass was two to five cents per barrel at the wellhead. (Petition, A-100). In addition, the record is replete with Arkansas brine leases, including one executed by Petitioner with respect to the very property made the subject of this litigation, which evidence the range of royalties historically paid for brine in that State. As was noted by the Court

of Appeals, Petitioner's brine lease provided for a royalty payment of 1/8 of the wellhead value of any brine which might be extracted from beneath his land (Petition, A-7).

The trial court also found the precise amount of the mineral that was displaced from beneath Petitioner's land. (Petition, A-97). The Court of Appeals correctly held that under the law of Arkansas Petitioner's damages should be based on the royalty value of the 7,612,000 barrels of the mineral, brine, that he lost as a result of Respondent's good faith trespass.

II.

The decision of the Court of Appeals does not conflict with any decision of any other Court of Appeals

Petitioner incorrectly asserts that the decision of the Court of Appeals is in conflict with the holdings of *Dow Chemical Co.* v. *Commissioner*, 433 F.2d 283 (6th Cir. 1970); *Pan American Petroleum Corp.* v. *Candelaria*, 403 F.2d 351 (10th Cir. 1968) and *Tidewater Oil Co.* v. *Jackson*, 320 F.2d 157 (10th Cir. 1963).

Dow Chemical Co. v. *Commissioner* involved an interpretation of highly technical and complex provisions of the Internal Revenue Code on a question of whether a chemical company in Michigan was permitted to take a depletion allowance for tax purposes on its income from several minerals extracted from brine. The *Dow* case does not deal in any form or fashion with the question of the measure of damage under Arkansas law which should be awarded to a landowner whose brine was taken from beneath his land as a result of a good faith trespass. The *Dow* Court held simply that under applicable provisions of the Internal Revenue Code the taxpayer's "gross income from mining", which was a statutory basis for depletion allowance, was

the gross sales value of the minerals extracted from brine. There is clearly no conflict in the decision of the court in *Dow* and that of the Court of Appeals here.

Pan American Petroleum Corp. v. *Candelaria* involved a dispute under New Mexico law. The suit was one to determine ownership of minerals. There is no question on this appeal concerning Petitioner's right to the ownership of the mineral involved here. The *Pan American* case did deal with a question of whether the plaintiff was entitled to recover damages under the law of New Mexico. The Court of Appeals held that he was. Here, however, the Court of Appeals was not concerned with whether Petitioner is entitled to recover damages under Arkansas law. There is no dispute in this case on that point. The only issue here is the *amount* of damages to which Petitioner is entitled. The Court of Appeals correctly held that the trial court did not follow Arkansas law in making its determination as to the amount of damage which Petitioner should recover.

Tidewater Oil Co. v. *Jackson* was a suit under Kansas law for the recovery of damages as a result of plaintiff's oil and gas wells having been physically damaged as a consequence of a negligently conducted water flooding operation by a neighboring landowner. One question on appeal was whether, under Kansas law, the plaintiff had a right to recover at all. After answering that question in the affirmative, the court simply held that under Kansas law the plaintiff was entitled to recover his lost profits which resulted from the physical damage to his oil and gas wells brought about by defendant's tortious activities.

It is readily apparent that Petitioner's claims of "conflict" are blatantly erroneous and that none of the decisions of the Court of Appeals which he cites conflict with the decision of the Court of Appeals in this case.

III.
The decision of the Court of Appeals does not conflict with any decision of any state court

Petitioner likewise erroneously contends that the decision of the Court of Appeals conflicts with the holdings of four decisions of the Supreme Court of Arkansas, *Burbridge* v. *Bradley Lumber Co.*, 218 Ark. 897, 239 S.W.2d 285 (1951); *Burford* v. *Upton*, 232 Ark. 456, 338 S.W.2d 929 (1960); *Young* v. *City of Gurdon*, 169 Ark. 399, 275 S.W. 890 (1925); and *Roberts* v. *Williams*, 15 Ark. 43 (1854).

Burbridge v. *Bradley Lumber Co.* is a timber trespass case. It does not deal with a mineral trespass. It is clear that the *Burbridge* court limited its decision to cases involving timber trespasses and did not change or modify the long-standing law of Arkansas with respect to good faith mineral trespasses. The plain language of the court in this respect is as follows:

> "The Appellee, Bradley Lumber Co., cut, removed and converted to lumber some 500,000 feet of timber from lands belonging to Burbridge, under the honest but mistaken belief that the land belonged to the Lumber Company."
>
> * * *
>
> "Our cases have laid down two different rules regarding the measure of damages for the innocent conversion of timber."
>
> * * *
>
> "The case at bar presents the issue of which rule this court is now going to follow as the law of this State." (239 S.W.2d at 285, 286 and 288)

There the court held that the damages assessed against the defendant which in good faith converted timber into

cross ties should be based on the value of the cross ties less the cost of labor, material and incidental items necessarily expended in transforming it.

The reasoning of the *Burbridge* decision is not applicable in this mineral trespass case because:

1. Here the evidence is undisputed that Respondent could not have recovered brine from lands which it either owned or leased without taking brine from beneath the surface of Petitioner's land. In a timber case, on the other hand, one can obviously cut trees from his own land without crossing property lines and cutting trees from the land of another.

2. Here the evidence is uncontradicted that Petitioner could not have efficiently or economically mined the brine from beneath his 169.1 acre tract of land. His own witnesses unequivocally testified that it would have been an "uneconomic and foolhardy" venture for Petitioner to operate a well on the 169.1 acre tract in question for the production of bromine and that no prudent operator would have drilled a well on that tract to produce brine therefrom.

In a timber situation, however, such as the one presented in *Burbridge*, a landowner who decides to engage in the lumber business does not require a huge investment of the character required for brine producing and bromine extraction facilities to conduct an operation such as the one engaged in by Respondent in south Arkansas. Presumably, with as small an investment as a chain saw, and perhaps a pick-up truck, a landowner who chooses to do so can efficiently and profitably conduct a timber operation if he owns a sufficient quantity of timber land.

The Court of Appeals correctly distinguished the *Burbridge* case from the instant case on these bases.

Petitioner's claim that *Burford* v. *Upton, Young* v. *City of Gurdon* and *Roberts* v. *Williams* conflict with the decision of the Court of Appeals highlights the absurdity of each of his contentions that this Court should review the decision of the Court below.

Burford was a condemnation suit involving lands condemned by the City of Little Rock. *Young* and *Roberts* were also condemnation suits. In *Young* the sole question was whether a city had the authority to condemn plaintiff's land in order to create a drainage system for the city. In *Roberts* the issue was whether a county had condemned plaintiff's land to create a county road pursuant to proper procedural rules established by the state condemnation statute. In none of these cases was there an issue involving trespass or damages for trespass.

The decision of the Court of Appeals does not conflict with any decision of any Arkansas state court, or indeed, with any decision of any court of any other state. To the contrary, it follows to the letter the decisions of all states which have considered the question of damages to be awarded in mineral trespass cases. See, *e.g., Dinwiddie Construction Co.* v. *Campbell,* 81 Nev. 469, 406 P.2d 294 (1965). Petitioner's have not dealt fairly with this Court is asserting that the decision of the Court below conflicts with decisions of the courts of the State of Arkansas.

CONCLUSION

Petitioner's wild and outrageous claims that he has been discriminated against, that he has been denied due process of law and that he has been denied his day in court are patently absurd and should be rejected out of hand. Petitioner has not only had two trials and two appeals, but, based on the decision of the Court of Appeals, his damage

award on remand will not be insubstantial. While Respondent believes that under the Arkansas law of capture Petitioner should recover nothing at all, it has not contested here the 1975 decision of the Court of Appeals. Nevertheless, it is crystal clear that the Court of Appeals correctly applied the law of Arkansas with respect to the formulation of Petitioner's damages as a result of Respondent's good faith trespass as determined by the Court of Appeals in 1975 and the trial court in 1977.

For each of the reasons stated above the Petition for Writ of Certiorari herein should be denied.

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